In The

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 777
NO. 932

THE FIRST NATIONAL BANK IN PLANT CITY,
Plant City, Florida,
and
WILLIAM B. CAMP, Comptroller of the Currency,
Petitioners,

v.

FRED O. DICKINSON, JR., Comptroller of the
State of Florida, Et. Al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

DOCKET ENTRIES.

Date	Filings—Proceedings.
10- 7-66	Filed complaint for declaratory judgment and an injunction pursuant to 28 USC 2201 and 2202.
10- 7-66	Filed Motion for Preliminary Injunction.
10- 7-66	Summons issued and delivered to Marshal with copy of complaint.
10- 7-66	J. S. 5 prepared.
10- 7-66	Filed Order for Hearing on Preliminary Injunction at 2:00 P. M. October 18, 1966.
10- 7-66	Copy of Motion for Preliminary Injunction and Order for Hearing on Preliminary Injunction delivered to Marshal for service on defendant.
10-17-66	Return on Summons as executed by Marshal on 10-12-66.
10-20-66	Filed Interlocutory Injunction Bond in the sum of $2500.00 with Home Indemnity Company as surety.
10-20-66	Order Staying Proceedings entered by Court, Copy mailed to Clerk, Circuit Court, Hillsborough County by Clerk.
10-20-66	Temporary Injunction entered by Court.
10-20-66	Findings on Fact and Conclusions of Law on Motion for Temporary Injunction won.
10-31-66	Stipulation as to extension of time by Defendant.

11-14-66 Filed Answer of defendant.

11-16-66 Motion to Intervene by Hillsboro Bank as a Defendant.

11-17-66 Answer and Defenses by Intervenor.

11-17-66 Notice of Hearing by Intervenor for 11/23/66.

11-17-66 Filed Motion of Brinks, Inc., of Florida, to Intervene as a Defendant.

11-17-66 Filed Notice of Hearing at 2:00 P. M., November 23, 1966, at Tallahassee, Florida.

11-18-66 Filed Motion of Peoples Bank of Lakeland and First Ruskin Bank to Intervene.

11-18-66 Filed Notice of Hearing at 2:00 P. M., November 23, 1966, at Tallahassee, Florida.

11-23-66 Filed Memorandum-Brief of The Hillsboro Bank, First Ruskin Bank, and Peoples Bank of Lakeland.

11-30-66 Amended answer and defenses & amended counterclaim on behalf of Hillsboro Bank.

12- 2-66 Filed Order: 1. Petitions of Hillsboro Bank, Peoples Bank of Lakeland and First Ruskin Bank for leave to intervene pursuant to the provisions of Rule 24 (a) of Federal Rules of Civil Procedure are denied; 2. Petitions of Hillsboro Bank, Peoples Bank of Lakeland and First Ruskin Bank for leave to Intervene pursuant to provisions of Rule 24 (b), Federal Rules of Civil Procedure are granted; 3. Intervenors ordered to file such amended pleadings and plaintiff shall have 15 days from service to move to strike all or any or all portions.

12- 1-66 Filed Order denying motion of Brinks, Inc., of Florida, for leave to intervene as a defendant herein.

12- 7-66 Filed Stipulation to the extension of time for responding to the defendants' defenses and counter-claim until December 15, 1966.

12- 7-66 Filed Order Extending Time for Responses. ap

12- 8-66 Transcript filed of Motion for Preliminary Injunction by Court Reporter.

1- 6-67 Filed Notice of Hearing at 2:30 P. M., January 26, 1967, at 2:30 P. M.

1-26-67 Motion to dismiss counterclaim of Fred O. Dickinson, Comptroller of State of Fla. Motion to Strike portions of answer and counterclaim of defendant, Fred O. Dickinson, Comptroller of the State of Fla.

1-31-67 Filed Notice of Trial set for 10:00 A. M., March 8, 1967.

2- 1-67 Motion to dismiss amended counterclaim of the defendant, the Hillsboro Bank, Intervenor.

2- 1-67 Motion to strike portions of amended answer, defenses and counterclaim of the defendant, The Hillsboro National Bank, Intervenor.

2- 1-67 Motion to strike portions of amended answer, defenses and counterclaim of the defendant, Peoples Bank of Lakeland and First National Ruskin Bank.

2- 1-67 Filed and entered Order: 1. Plaintiff's Motion to Dismiss Counterclaim of Fred O. Dickinson, Jr., Motion to Strike Portions of Answer and Counter-claim of Defendant Fred O. Dickinson, Jr.,

Motion to Strike Portions of Amended Answer, Defenses and Counterclaim of the Defendant, The Hillsboro Bank, Intervenor, Motion to Dismiss Amended Counterclaim of the Defendants, Peoples Bank of Lakeland and First Ruskin Bank, Intervenors, Motion to Strike Portions of Amended Answer, Defenses and Counterclaim of Defendants, Peoples Bank of Lakeland and First Ruskin Bank are denied. 2. Plaintiff granted 10 days from date of Order, January 31, 1967, within which to file responsive pleadings to Counterclaim of Defendant, the Amended Counterclaim of Defendant The Hillsboro Bank, Intervenor, and Amended Counterclaim of Defendants Peoples Bank of Lakeland and First Ruskin Bank, Intervenors.

2- 3-67 Notice of taking of depositions of WILLIAM M. RICKERT for 2-7-67 by Intervening defendant.

2- 6-67 Filed Court Reporter's Transcript of Proceedings held January 26, 1967.

2-13-67 Filed and entered Order Granting Leave to File Brief as Amicus Curiae on behalf of Brink's Inc., of Florida.

2-13-67 Petition to file Brief as Amicus Curiae by the Independant Banker's Association.

2-13-67 Notice of Taking of Depositions of FRANK MOODY, WILLIAM DANCE, EMMETT LAIRD by the Plaintiff.

2-17-67 Notice of hearing on petition of independent bankers of Florida and independent bankers association of America to file brief as Amicus Curiae.

2-20-67 Motion to reschedule trial by comptroller of the Currency.

Intervenor-plaintiff's complaint for declaratory judgment and injunctive relief.

Memorandum of points and authorities in support of motion for leave to intervene by the Comptroller of the Currency.

Affidavit by Wm. B. Camp, Comptroller of the Currency.

Motion for leave to intervene as party plaintiff.

2-20-67 Notice of Hearing for 2-27-67, 2:30 P. M. on motions by plaintiff intervenor.

2-21-67 Filed depositions of William M. Rickert, Charles Futch and William C. Meriwether.

2-23-67 Filed Intervening Defendants The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, Objection to Motion to Intervene.

2-28-67 Filed and entered Order dated February 27, 1967: 1. Motion to intervene for and in behalf of the Comptroller of the Currency of the United States is granted and the complaint attached to the motion shall be considered filed as of this date. 2. All motions for summary judgment filed for and in behalf of any party hereto shall be filed no later than March 20, 1967. 3. Final pre-trial conference and hearing on all pending motions shall be heard at 10:00 A. M. April 10, 1967, at Tallahassee, Florida. At this conference the Court will hear from counsel and will consider consolidation of this action for trial purposes with Marianna Civil Action No. 673. 4. The final hearing and/or trial, as necessary, shall commence at 10:00 A. M., April 25, 1967, at Tallahassee, Florida.

3- 1-67 Filed plaintiff's Answer to Defendant's (Fred O. Dickinson, Jr.) Counterclaim.

3- 1-67 Filed plaintiff's Answer to Counterclaim of the Hillsboro Bank.

3- 1-67 Filed plaintiff's Answer to Counterclaim of Peoples Bank of Lakeland and First Ruskin Bank, Intervenors.

3- 7-67 Depositions of EMMETT LAIRD, WILLIAM A. DANCE, FRANK H. MOODY taken by Plaintiff.

3-17-67 Filed Notice of Taking Depositions of Dr. Roy Ellis, Robert Jeffries, Chester McDonald, and Mrs. Doris Pruett at Plant City, Florida, on March 29, 1967.

3-17-67 Filed Interrogatories of Intervening Defendants, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland.

3-17-67 Filed Intervening Defendants' Motion to Produce.

3-17-67 Filed Affidavit in Support of Motion to Produce addressed to Plaintiff The First National Bank in Plant City.

3-17-67 Filed Intervening Defendants' Interrogatories to Plaintiff-Intervenor.

3-17-67 Filed Intervening Defendants' Motion to Produce by Intervening Plaintiff.

3-17-67 Filed Affidavit in Support of Motion to Produce Addressed to Intervening Plaintiff Comptroller of the Currency.

3-20-67 Filed and Entered: Intervening Defendant The Hillsboro Bank, First Ruskin Bank and People

Bank of Lakeland Supplemental Motion to produce

3-20-67 Filed and Entered: Plaintiff's Motion for Summary Judgment

3-20-67 Filed and Entered: Affidavit of William M. Rickert

3-20-67 Filed and Entered: Memorandum of Plaintiff in support of Motion for Summary Judg.

3-20-67 Filed and Entered: Intervening Defts. The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland Supplemental Interrogatories

3-20-67 Filed and Entered: Intervening Defts. above named Supplemental Motion to Produce

3-20-67 Filed Plaintiff-Intervenor's Motion for Summary Judgment.

3-20-67 Filed Memorandum in Support of Plaintiff-Intervenor's Motion for Summary Judgment.

3-20-67 Filed and Entered: Answer and Defenses of Fred O. Cickinson, Jr. Comptroller State of Florida

3-21-67 Filed Intervening Defendants' Motion for Enlargement of Time and to Continue Hearing on Motion for Summary Judgment and Trial.

3-21-67 Filed Intervening Defendants' Motion to Strike.

3-23-67 Filed Answer and Defenses of Peoples Bank of Lakeland and First Ruskin Bank.

3-23-67 Filed Answer and Defenses of The Hillsboro Bank.

3-23-67 Filed Order Granting Petition of Independent Bankers of Florida and Independent Bankers

Association of America to File a Joint Brief Amicus Curiae.

3-27-67 Supplemental motion to produce

Affidavit in support of supplemental motion to produce addressed to intervening Plaintiff comptroller of the currency

3-27-67 Supplmental interrogatory no. 23

3-27-67 Motion to strike

3-28-67 Filed plaintiff's Objections to Interrogatories and Supplemental Interrogatories Propounded by Intervening Banks.

3-28-67 Filed Notice of Hearing on Objections to Interrogatories at 10:00 A.M. April 10, 1967, at Tallahassee, Florida.

3-29-67 Filed Notice of Taking Depositions.

3-31-67 Filed and entered Supplemental interrogatories Nos. 2-7, Supplemental Interrogatory No. 24, Motion to compel attendance at depositions, Notice of Hearing, Supplemental Motion to Produce No. 2, and Motion to Strike, filed by intervening Defendants

3-31-67 Order of Court that all pending motions with exception of motion for summary judgment shall be argued and presented to the Court on 4-10-67 and ruling on other motions as to enlargment of time and set dates for answers or objections, and order on deposition as to Wm. B. Camp and Robt. L. Schwind

4- 6-67 Stipulation of Parties filed

4- 7-67 Motion to Compel Attendance at Depositions

4- 7-67 Notice of Taking of Depositions of WM. B. CAMP & ROBT. L. SCHWIND by the Defendant

4- 7-67 Notice of Hearing by Defendant for 4-10-67, 10:00 A.M. on motion for compelling

4-10-67 Filed: Plaintiffs answer to interrogatories propounded by intervenors

4-10-67 Filed: Motion to strike Affidavit by Defendants

4-17-67 Filed Notice of Taking Dep[illegible] at Plant City, Florida, on April 19, 196[illegible].

4-17-67 Filed Supplemental Affidavit of William M. Rickert in Support of Motion for Summary Judgment.

4-17-67 Filed: Memorandum in opposition to intervening defendant's motion to strike certain portions of the affidavit of William B. Camp, Comptroller of the Currency

Filed: Memorandum in support of objections to interrogatories and opposition to motion for production

Filed: Answers to interrogatories by Wm. B. Camp

Filed: Objections to interrogatories and opposition to motion for production

Filed: Motion for order that deposition not be taken

Filed: Memorandum in support of motion for order that deposition not be taken

Filed: Order on all motions filed to date

4-17-67 Filed: PRE-TRIAL ORDER

4-18-67 Filed Motion to Strike Supplemental Affidavit of William M. Rickert in Support of Motion for Summary Judgment.

4-20-67 Filed: Defendant's Joint Memorandum in opposition to motions for Summary Judgment.

4-21-67 Filed Affidavit of Fred O. Dickinson, Jr.

4-21-67 Filed Affidavit of John V. Chapman.

4-21-67 Filed Affidavit of Ray Green.

4-21-67 Filed Affidavit of Frank H. Moody.

4-24-67 Filed plaintiff-intervenor's Answer to Counterclaim.

4-24-67 Filed plaintiff-intervenor's Answer to Counterclaim.

4-24-67 Filed plaintiff-intervenor's Answer to Counterclaim.

4-24-67 Filed plaintiff's Joint Supplemental Memorandum in Opposition to Motions for Summary Judgment.

4-24-67 Filed Affidavit of Felix Schmidt, Jr.

4-24-67 Filed intervening-defendants' Notice of Filing Evidence in Opposition to Motions for Summary Judgment.

4-24-67 Filed returns of deposition subpoenas for R. D. Elston, Sandra Smith, Ronald H. Baker, Leon J. Souther, and Leroy Renfroe.

4-24-67 Filed Supplemental Affidavit of William M. Rickert in Support of Motion for Summary Judgment.

4-24-67 Filed defendant Dickinson's Certificate of Service.

4-24-67 Filed depositions of Robert W. Jeffries, Arthur Roy Ellis, Jr., Mrs. Doris B. Prewitt, Harley White, Jessie Leon Pelham, Mary Jane Davis, Ronald H. Baker, Elliott Alexander Telford, Jr., Richard D. Elston, Leroy Renfroe, Leon J. Souther, and Robert L. Schwind.

4-24-67 Filed exhibit entitled "Digest of Opinions".

4-24-67 Filed exhibit entitled "Comptrollers Manual for National Banks".

4-24-67 Filed: Motion to postpone hearing on pending motions for summary judgment, to require production of written materials, and to allow and Order further recovery.

4-24-67 Filed letter from Attorney D. Fred McMullen dated April 17, 1967, addressed to Judge Carswell confirming telephone conversation, during which it was agreed that it would not be necessary for Wm. Joe Sears and D. Fred McMullen to file a brief as amici curiae at this time.

4-25-67 Filed deposition of Chester McDonald.

4-28-67 Filed plaintiff-intervenor's Objection to Supplemental Interrogatory Number 24.

5- 1-67 Filed Notice of Compliance by defendant Comptroller Fred O. Dickinson, Jr.

5- 3-67 Filed Supplemental Affidavit of Frank Moody.

5- 3-67 Filed Supplemental Affidavit of Ray Green.

5- 5-67 Filed Affidavit of Fred O. Dickinson, Jr.

5- 6-67 Filed Memorandum-Decision.

5- 6-67 Filed and entered Order that: 1. Motions of the plaintiff and plaintiff-intervenor for summary judgment with respect to the issues raised concerning the application of 12 USC 26 and 12 USC 81 are granted; and 2. That the remaining issues raised by the motions for summary judgment, that is, the validity of the defense interposed by intervenor-defendants with respect to the application of 12 USC 24 (seventh) to the services referred to in Paragraph 1 above and the authority of the State Comptroller to intervene in the affairs of national banks will be carried forward for further hearing and consideration by this Court, and will be made the subject matter of another and separate order.

6- 2-67 Filed and entered Order that: 1. The First National Bank in Plant City was duly authorized by the Comptroller of the Currency of the U. S. to conduct armored car messenger and off-premises receptacle services consistent with the Comptroller's ruling 7490. If the armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not branches within the meaning of 12 USC 36 or in contravention of Section 659.06(1)(a) Florida Statutes. 3. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City do not violate 12 USC 81. 4. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by

the First National Bank in Plant City are not in violation of or in conflict with Florida law. 5. Although plaintiff First National Bank in Plant City is entitled to a decree permanently enjoining Fred O. Dickinson, Jr., Comptroller of the State of Florida, from interfering with the Bank's operation of its armored car messenger and off-premises receptacle services, the defendant State Comptroller has stipulated in open court his intention to abide this Court's order without necessity for further injunctive relief, permanent injunction will therefore be withheld; further ordered that Court's order of May 6, 1967, granting partial summary judgment and accompanying memorandum-decision are hereby incorporated in full into this Final Judgment; further ordered that to the extent not heretofore granted or denied, intervening defendants' motion to produce, and motion to strike are denied; further ordered that the temporary injunction entered against defendant State Comptroller pending final determination in this action is dissolved; further ordered that the Court's Order Staying Proceedings in Case No. 155831 in the Circuit Court of Hillsborough County, Florida, is rescinded and set aside and it is further ordered that all counter claims filed by defendant and intervening defendants be dismissed with prejudice and final judgment is entered for plaintiffs and against defendant and intervening defendants.

6- 5-67 J.S. 6.

6- 6-67 Filed Notice of Compliance on behalf of Fred O. Dickinson, Jr., Comptroller of the State of Florida.

6-12-67 Filed Joint Notice of Appeal to Court of Appeals. Copies of Notice of Appeal mailed to respective counsel by counsel for Fred O. Dickinson, Jr., etc.

6-12-67 Filed Stipulation Dispensing with Bond on Appeal.

6-13-67 Certified copy of Notice of Appeal mailed to Clerk, U. S. Court of Appeals, New Orleans, Louisiana.

6-23-67 Designation to Court Reporter filed by Appellant.

7- 5-67 Filed: Stipulation that designated parts of the record which need not be transmitted to Court of Appeals.

7-12-67 Filed Petition for Extension of Time to and including August 15, 1967, for Filing Transcript of Record of Court Reporter and Order granting same.

8- 7-67 Filed Court Reporter's transcript of proceedings held on November 23, 1966.

8- 7-67 Filed Court Reporter's transcript of proceedings held on April 25, 1967.

8- 7-67 Filed Court Reporter's transcript of proceedings held on May 6, 1967.

8-11-67 Original Court file forwarded to Clerk, U. S. Court of Appeals, New Orleans, Louisiana, as record on appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

COMPLAINT—FILED OCTOBER 7, 1966

COUNT I

1. Plaintiff is a National Banking Association organized and existing under the National Banking Act, Chapter 2, Title 12 United States Code and has its offices at 302 West Haines Street, Plant City, Florida.

2. Defendant is Comptroller of the State of Florida and Ex Officio, the State Commissioner of Banking and as such is an official of the executive branch of the government of the State of Florida. He maintains his residence and offices in Tallahassee, Leon County, Florida.

3. This action arises under 12 USC 21, 12 USC 24 (7), 12 USC 36, 42 USC 1983, and Article 6, Clause 2 of the United States Constitution.

4. This Court has jurisdiction of the controversy which is the subject of this action pursuant to 28 USC 1331 and 28 USC 1343. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

5. This is a proceeding for a declaratory judgment and an injunction pursuant to 28 USC 2201 and 2202, and other applicable law.

6. Plaintiff shows that it received a letter dated June 29, 1966, from the Office of the Comptroller of the Currency, Sixth National Bank Region, signed by Regional Counsel, stating that it may as an incident to its banking business construct a receptacle away from its premises for receipt of its customers' cash and items, which cash and items would be recovered by a bank messenger acting as agent for said customers, and delivered onto the premises of the

bank for deposit to the accounts of said customers thereat. Said receptacle would clearly spell out on a public notice placed thereon that the bank's messenger would be acting solely as agent of the customers and not as agent for the bank. Pursuant to this ruling of the Office of the Comptroller of the Currency, Plaintiff has commenced the construction of said receptacle. See attached copy of said letter as Exhibit A.

7. Plaintiff shows that, pursuant to Paragraph 7490 of *The Comptroller's Manual for National Banks,* which reads as follows:

> "To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.",

it purchased an armored car for the purpose of meeting its customers' needs for better service and intends to operate an armored car messenger service as agent for its customers pursuant to agency agreements which spell out the rights of the parties thereto.

8. On September 30, 1966, Plaintiff received a letter dated September 28, 1966, from J. V. Chapman, Deputy Commissioner of Banking, an employee or servant of Defendant, requiring Plaintiff to cease and desist, under threat of court proceedings, from its plans to maintain a receptacle and an armored car messenger service because of alleged violation of Section 659.06 (1) (a) Florida Statutes. See attached copy of said letter as Exhibit B.

9. Plaintiff, as a National Bank, is a creature and instrumentality of the United States, subject to the paramount authority of Congress to legislate for it, and subject to examination, regulation and supervision by the Office of the Comptroller of the Currency, United States Treasury Department.

10. Plaintiff derives all of its rights, powers, privileges and immunities from Federal law and none from state law.

11. Defendant has no authority under Federal law to define the rights, privileges, powers and immunities of Plaintiff or to supervise and regulate the business of banking conducted by Plaintiff. Defendant has no authority to issue cease and desist orders to Plaintiff seeking to curtail Plaintiff's exercise of its powers, rights, privileges and immunities under Federal law.

12. Defendant's effort to restrict or prohibit Plaintiff from maintaining a receptacle away from its premises and from operating an armored car messenger service as agent for its customers, which are permitted to Plaintiff under Federal law and regulation, is in derogation and contravention of the paramount Federal law and regulation and is therefore null, void, and unconstitutional.

13. Defendant's effort to restrict or prohibit Plaintiff from maintaining a receptacle away from its premises and from operating an armored car messenger service, under color or pretence of state law, is in contravention of 42 USC 1983.

14. The Constitution, laws and regulations of the United States are the supreme law of the land. Defendant's attempt to impose the limitations of state law on the banking activities of Plaintiff is in derogation of Federal law and regulation and a usurpation of the regulatory and supervisory powers vested by Congress exclusively in the Fed-

eral bank regulatory agencies, principally the United States Comptroller of the Currency.

15. Section 659.06 (1) (a) Florida Statutes as interpreted by the Comptroller of the State of Florida, insofar as it purports to apply to Plaintiff, is unconstitutional.

WHEREFORE PLAINTIFF PRAYS:

1. For a judgment declaring that Plaintiff, as an instrumentality of the United States, subject to the paramount power of Congress to legislate for it, is not subject to any state law limiting its powers, rights, privileges and immunities and especially to Section 659.06 (1) (a) which contravenes Federal law and regulation, which interferes with the rights, powers, privileges and immunities of Plaintiff granted by Federal law and regulation, and which impairs the Plaintiff's efficiency and frustrates the purposes of Plaintiff's creation.

2. For a judgment declaring that the Constitution, laws, and regulations of the United States as they apply to National Banks are the supreme law of the land, and that where Federal law and state law conflict, the latter must yield as a matter of Supremacy.

3. For a judgment declaring that Section 659.06 (1) (a), as interpreted by the Comptroller of the State of Florida, insofar as it purports to interfere with the rights, powers, privileges and immunities granted by Federal law to Plaintiff, is unconstitutional.

4. For a judgment declaring that state officials are without authority to regulate and supervise National Banks or otherwise usurp the regulatory and supervisory functions vested by Congress in the Comptroller of the Currency.

5. For a decree enjoining Defendant from interfering with the lawful operations of Plaintiff in carrying on the

business of banking by maintaining a receptacle off premises and an armored car messenger service as agent for its customers pursuant to the paramount Federal law and regulation, attempting himself or through his agents, attorneys, or any officials of the State of Florida, by legal or administrative process or otherwise, to prevent Plaintiff from conducting its lawful banking business, and from attempting, under color of state law, regulation, or otherwise to deprive Plaintiff of its rights, powers, privileges and immunities granted by the paramount Federal law and regulation.

6. For such other relief as this Court deems proper.

COUNT II

1. For further and additional relief Plaintiff realleges all allegations contained in paragraphs 1 through 8 of Count I of Plaintiff's Complaint in their entirety.

2. Plaintiff alleges that the services furnished and to be furnished by Plaintiff, that is, the establishment and maintenance of a receptacle away from its premises for receipt of its customers' cash and items, which said cash and items will be transported to Plaintiff's banking premises by a bank messenger acting as agent for said customers, which said cash and items pursuant to an understanding with said customers will be accepted by said Plaintiff for deposit to the accounts of said customers at the time same reaches Plaintiff's banking house; and the rendering of messenger service to customers of Plaintiff by means of an armored car pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the Plaintiff, with the further understanding that cash and items received by said messenger are not considered as having been received by Plaintiff until they are actually delivered to the teller at Plaintiff's banking house and by such agreement a check is considered

as having been paid at the bank when the money in question is handed to the messenger as agent for the customer; is not in contravention or conflict with Section 659.06 (1) (a) Florida Statutes, which reads as follows:

> "Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. . . ."

3. Plaintiff alleges that an actual bona fide dispute exists as to the reasonable interpretation of said statute and its application to this Plaintiff, which Plaintiff is entitled to have declared pursuant to 28 USC 2201 and 2202 and other applicable law.

4. Plaintiff has reason to believe and believes that Defendant will seek by legal or administrative action or otherwise to restrain Plaintiff from lawfully carrying on the business of banking by maintaining a receptacle off premises and by operating an armored car messenger service as agent for its customers.

5. Plaintiff states that it has invested considerable money in its receptacle and armored car service and that it will suffer irrevocable and irreparable damage and injury unless Defendant is restrained from interfering with its lawful powers, rights, privileges and immunities.

WHEREFORE PLAINTIFF PRAYS:

1. That as further and additional relief in this proceeding this Court will enter its judgment declaring that the acts and services rendered and to be rendered by Plaintiff is not in violation of or conflict with Section 659.06(1)(a) Florida Statutes.

2. For a decree enjoining Defendant from interfering with the lawful operations of Plaintiff in carrying on the business of banking by maintaining a receptacle off premises and an armored car messenger service as agent for its customers.

The First National Bank in Plant City
By /s/ William M. Rickert
President

Edwards and Sawyer
Attorneys for Plaintiff
P. O. Box 1119
Plant City, Florida
By /s/ Robert S. Edwards

Exhibit "A"

THE REGIONAL ADMINISTRATOR OF
NATIONAL BANKS
Sixth National Bank Region
1315 Fulton National Bank Building
Atlanta, Georgia 30303

June 29, 1966

(Seal)

United States Treasury

Mr. William M. Rickert, President
The First National Bank in Plant City
Box 1480
Plant City, Florida 33566

Dear Mr. Rickert:

In your letter of June 28, 1966, you inquire whether the bank may construct a receptacle at a shopping center

which would receive night bags containing money and checks. These would be recovered daily from the receptacle by a messenger and taken to the bank for deposit.

A National Bank, as an incident to its banking business, may construct off of its premises a receptacle for the receipt of night bags containing cash and checks. The receptacle should contain thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice may also advise that adequate insurance coverage will be provided and proper security measures taken. Such a service would not constitute branch banking as defined in 12 U.S.C. 36(f).

Very truly yours,

/s/ Robert L. Schwind
Robert L. Schwind
Regional Counsel
Sixth National Bank Region

RLS:w

Florida Georgia South Carolina

Exhibit "B"

(Seal)

STATE OF FLORIDA

OFFICE OF THE COMPTROLLER
Tallahassee
32304

Fred O. Dickinson, Jr.
Comptroller

J. V. Chapman
Deputy Commissioner of Banking

September 28, 1966

Mr. W. M. Rickert, President
The First National Bank in Plant City
Plant City, Florida

Re: Night Depository, Armored Car
Messenger Service

Dear Mr. Rickert:

It has been brought to my attention that the First National Bank in Plant City, Florida is currently constructing a depository located approximately one (1) mile from its main banking house and in a shopping center. Also, your bank has advertised an armored car messenger service either already in operation or soon to be placed in operation.

I have taken this up with my general counsel and we feel that these two activities are in violation of Section 659.06(1)(a), Florida Statutes. This type of activity is of statewide interest in that we have received complaints from several areas on these matters. This letter is to request that you cease and desist any further plans for

these proposed operations and/or current operations due to the violation of the above cited statutory enactment, otherwise, the Comptroller's Office will be forced to institute legal proceedings to curtail same.

I would appreciate an early reply to this letter.

Sincerely,

Fred O. Dickinson, Jr.
State Commissioner of Banking

By: /s/ J. V. Chapman
J. V. Chapman
Deputy Commissioner

JVC:jmh

cc: Honorable Charles McClure
General Counsel for Comptroller

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR TEMPORARY INJUNCTION —FILED OCTOBER 20, 1966

FINDINGS OF FACTS

This matter came on to be heard upon the sworn complaint of The First National Bank in Plant City, a national banking association, plaintiff in the above styled cause; plaintiff's motion for preliminary injunction and order of this court dated October 7, 1966 for hearing on preliminary injunction, due and proper service of process has been had upon Fred O. Dickinson, Jr., Comptroller of

the State of Florida and Ex Officio Commissioner of Banking, the summons, complaint and order for hearing on preliminary injunction was duly served upon said defendant on the 12th day of October, 1966. There was present before the Court counsel for the plaintiff, The First National Bank in Plant City, and the said Fred O. Dickinson, Jr. as Comptroller of the State of Florida and Ex Officio Commissioner of Banking was represented before this Court at this hearing by competent counsel.

The Court finds that by a ruling of the United States Comptroller of the Currency duly rendered, national banks are authorized by Section 7490 to provide messenger service by means of an armored car or otherwise to serve their customers. The Court further finds that by special ruling dated June 29, 1966 by Robert L. Schwind, Regional Counsel for the Sixth National Bank Region, by letter to The First National Bank in Plant City that national banks as an incident to their banking business are authorized to construct off of their premises receptacles for the receipt of night bags containing cash and checks provided the said receptacle contains thereon a notice clearly stating that the messenger who will recover the night bags is acting as agent for the customers, and that funds will not be determined to be deposited until delivered to a teller at the bank premises.

Adequate testimony was introduced and the Court finds that the plaintiff acting with apparent authority and pursuant to rulings of the United States Comptroller of the Currency, has undertaken to render a messenger service by the purchase of an armored car and by the establishment of a receptacle at Plant City Plaza Shopping Center about one mile from the banking house of the plaintiff for the pickup of locked night bags and envelopes containing customers cash and items. The arrangement with each of plaintiffs customers using the Bank Messenger

Service is established by a contract, either formerly executed by persons or firms using locked bags or by written contract contained on the transmittal slip of customers using the service in question pursuant to the ruling of the United States Comptroller of the Currency.

Testimony was introduced by the defendant through an assistant to the Commissioner of Banking of the State of Florida, that no arrangement such as that carried on by the plaintiff was allowed to state banks by the Commissioner of Banking of the State of Florida and that it had been the ruling of the State Banking Commissioner for many years that such practice was prohibited by the laws of the State of Florida by Section 659.06(1) and by Section 659.52 Florida Statutes.

It was further established that pending a hearing on the order of this Court for the issuance of a preliminary injunction as prayed by plaintiff that the defendant has filed in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Case No. 155831, a complaint for injunction and other relief wherein the said Fred O. Dickinson Jr., as Comptroller of the State of Florida, is the plaintiff and The First National Bank in Plant City is the defendant. The said Fred O. Dickinson Jr. as Comptroller of the State of Florida and Ex Officio Commissioner of Banking, is seeking to enjoin and restrain The First National Bank in Plant City both temporarily and permanently from the operation of its banking facilities as authorized by the United States Comptroller of the Currency.

The Court finds that an injunction pending a final disposition of this proceeding will irreparably injure or damage plaintiff, The First National Bank in Plant City.

CONCLUSIONS OF LAW

This Court finds that it has jurisdiction of the parties to this proceedings and the subject matter of this suit, that the United States Comptroller of the Currency is vested by the Congress of the United States with regulatory and supervisory power over national banks and that the Supreme Court of the United States has established that "National Banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States or either frustrates the purpose of the National legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created." (See Davis v. Elmira Savings Bank, 161 U.S. 283 (1896). The United States Supreme Court has further held that ". . . banks are instrumentalities of the Federal government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of Congressional legislation. But any attempt by a State to define their duties or control the conduct of their officers is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created. . . ." (See First National Bank of San Jose v. State of California, 262 U.S. 366, 368.)

The United States Comptroller of the Currency by formal rulings has authorized plaintiff to undertake the services now rendered by plaintiff, which services have given rise to the objection of the defendant. The United

States Comptroller of the Currency is charged with responsibility of supervision and control of national banks and plaintiff herein acted in reliance on the apparent authority of that Executive officer.

The Court finds that the defendant, Banking Commissioner of the State of Florida, has under color or pretense of State law, directed the plaintiff to cease and desist and has sought to enjoin the plaintiff from the exercise of an apparently valid privilege and prerogative and from the apparently lawful operation of its business as authorized by the United States Comptroller of the Currency in derogation of Federal law.

The Court finds that plaintiff is entitled to a temporary injunction pending final disposition of this suit including a stay of the proceedings now filed in the Circuit Court of the Thirteenth Judicial Circuit in and for the State of Florida.

DONE in chambers this 20th day of October, 1966.

/s/ G. Harrold Carswell
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

ANSWER AND COUNTERCLAIM—FILED NOVEMBER 14, 1966

Answer to Count I

Defendant for his answer to Count I of the Complaint herein:

FIRST DEFENSE

Alleges that Count I of the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Admits the allegations of paragraphs 1, 2, 5 and 9.

As to paragraph 3, Defendant admits that Plaintiff seeks to bring to action pursuant to the laws cited therein.

As to paragraph 4, Defendant admits the allegations therein, but denies that 28 U.S.C., Section 1343 confers jurisdiction in this matter.

As to paragraph 6, admits Plaintiff received said letter, but denies all other facts therein alleged.

As to paragraph 7, admits that said paragraph 7490 reads as set forth, but denies all other facts therein alleged.

As to paragraph 8, admits sending said letter to Plaintiff, and alleges that Defendant in sending said letter assumed that Plaintiff was familiar with the law under which it operates and in particular the provisions of the federal branching statute, 12 U.S.C., Section 36 (c) and (f), which clearly binds all National banks in Florida, including Plaintiff, to observe the antibranching statute of Florida, Section 659.06 (1) (a), set forth in said letter, and the federal bank location statute, 12 U.S.C., Section 81 which clearly states that National banks may operate only in one location, the only exception therein being approved branches which, in this situation, are prohibited in Florida by the combined operation of federal law in Section 36 (c) and the Florida law in Section 659.06 (1) (a); and Defendant by his said letter sought to obtain compliance by Plaintiff with said federal and state laws.

As to paragraph 10, admits that Plaintiff's powers are derived from federal law, but alleges that said Florida statute is binding upon Plaintiff by virtue of said federal laws, 12 U.S.C., Sections 36 (c) and 81, and that by virtue thereof Plaintiff is limited to conducting its banking busi-

ness in one location and cannot operate in other locations by means of receptacles and armored car operations.

As to paragraph 14, admits the supremacy of federal law, but only to the extent of preemption of the field; and alleges that the federal government has not preempted the field involved here and, on the contrary, has specifically deferred to state law by adopting the restrictions of state law which in Florida clearly prohibit a state bank from operating the banking business in more than one location, and consequently, by operation of said federal law, a national bank is similarly restricted.

Denies the allegations of paragraphs 11, 12, 13 and 15.

Except as hereinbefore admitted, qualified and specifically denied, Defendant denies all allegations of Count I of the Complaint.

THIRD DEFENSE

Alleges that Plaintiff bank, by use of a receptacle for receiving deposits at a place about a mile from its banking office and by use of an armored car owned by it and operated under its direction by its employees for the purposes of receiving deposits and for other banking purposes, is operating its banking business at more than one location, in violation of the federal law, 12 U.S.C., Section 81.

FOURTH DEFENSE

Alleges that Plaintiff bank, by use of a receptacle for receiving deposits at a place about a mile from its banking office and by use of an armored car owned by it and operated under its direction by its employees for the purposes of receiving deposits and for other banking purposes, is operating branches as defined in the federal law, 12 U.S.C., Section 36 (f), which is prohibited by 12 U.S.C., Section 36 (c) by virtue of Florida Statute, Section 659.06 (1) (a).

Answer to Count II of the Complaint

For his answer to Count II of the Complaint, Defendant:

FIRST DEFENSE

Alleges that Count II of the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

As to paragraph 1, realleges all of his answers to paragraphs 1 through 8 of Count I of the Complaint.

Defendant denies the allegations of paragraphs 2 and 5.

Defendant admits the allegations of paragraph 3.

As to paragraph 4, admits that Defendant seeks to restrain Plaintiff's off-premise operations, but denies that said operations are lawful; and alleges that said operations are prohibited for the reasons stated in the Third Defense and Fourth Defense to Count I above.

THIRD DEFENSE

Realleges the Third Defense to Count I of the Complaint.

FOURTH DEFENSE

Realleges the Fourth Defense to Count I of the Complaint.

Counterclaim

As and for his counterclaim against Plaintiff, the Defendant alleges:

1. Defendant is Comptroller of the State of Florida and Ex Officio, the State Commissioner of Banking and as such is an official of the executive branch of the gov-

ernment of the State of Florida. He maintains his residence and offices in Tallahassee, Leon County, Florida.

2. Plaintiff is a National Banking Association organized and existing under the National Banking Act, Chapter 2, Title 12 United States Code and has its offices at 302 West Haines Street, Plant City, Florida.

3. The action arises under 12 U.S.C., Sections 36 and 81.

4. This is a proceeding for a declaratory judgment and an injunction pursuant to 28 U.S.C. 2201 and 2202, and other applicable law.

5. This Court has jurisdiction pursuant to 28 U.S.C., Section 1331. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

6. Plaintiff has prior to the commencement of this action, and continues to operate a receptacle or depository for the receipt of deposits about one mile from its banking office, in violation of 12 U.S.C., Section 81 which restricts its operation as a bank to one location, namely, its banking office at 302 West Haines Street, Plant City, Florida.

7. Plaintiff has, prior to the commencement of this action, and continues to operate as its agency, an armored car owned by it and operated by its employees for the purpose of soliciting and obtaining deposits and for other banking purposes at many places away from its said banking office, in violation of 12 U.S.C., Section 81 which restricts its operation to one location as aforesaid.

8. Plaintiff, by using said receptacle and armored car, is operating branches as defined in 12 U.S.C. 36 (f) and prohibited by 12 U.S.C., Section 36 (c) by virtue of Section 659.06 (1) (a) of Florida Statutes.

9. Plaintiff, in view of the fact that it operates said receptacle and armored car operation as its agencies, instrumentalities and places of business off-premises is in

violation of said letter of June 29, 1966, referred to in paragraph 6, Count I of the Complaint and said paragraph 7490 of the Comptroller's Manual for National Banks referred to in paragraph 7 of Count I of the Complaint.

10. Unless restrained, Plaintiff and other national banks in Florida will continue and spread the use of such receptacles and armored car operations, to the detriment and irreparable and increasing damage of state banks in Florida.

11. Unless restrained, Plaintiff bank and other national banks operating in Florida will continue to have, and increasingly will have, competitive advantage over state banks in the relevant competitive areas, for the reason that state banks under Florida law are prohibited from operating such receptacle and armored car facilities; and that such competitive disadvantage for state banks is contrary to the basic concept underlying the intent of Congress in enacting 12 U.S.C., Section 36 and other similar laws which govern the basic operations of national banks according to the state law governing state banks whereever national banks conduct their business.

12. Among the duties of Defendant is the enforcement of the banking laws of the State of Florida, particularly Sections 659.06 (1) (a) and 659.52, Florida Statutes and particularly to enforce these laws pursuant to the federal laws, 12 U.S.C., Sections 36 and 81, which bind national banks to the restrictions imposed upon state banks by said state laws; and Defendant has the right to protect state banks as state instrumentalities from the competitive disadvantages inherent in Plaintiff's operation of receptacle and armored car facilities which facilities are denied to state banks by virtue of state law.

WHEREFORE, Defendant prays

(a) That the Court take jurisdiction of the parties and subject matter hereof.

(b) That the Court declare and adjudge that the off-premises receptacle and armored car facilities of Plaintiff constitute operation of branches in violation of 12 U.S.C., Sections 36 (c) and 81 in combination with Section 659.06 (1) (a) of Florida Statutes.

(c) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, First National from engaging in such branch operations and that the Court vacate its temporary injunction granted on October 20, 1966.

(d) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, First National from seeking authority from the Comptroller of Currency to engage in such branch operations.

(e) That the Court dismiss the Complaint and grant such other and further relief as it deems meet and proper.

(f) That Defendant have his costs and reasonable attorney's fees herein.

/s/ Fred O. Dickinson, Jr.,
Comptroller of the State of Florida

/s/ Earl Faircloth
Attorney General

/s/ Larry Levy
Assistant Attorney General

/s/ Charles D. McClure
General Counsel
Comptroller's Office

/s/ V. Carroll Webb
Associate Counsel for the Comptroller
Capitol Building
Tallahassee, Florida

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AMENDED ANSWER AND DEFENSES —FILED NOVEMBER 30, 1966

Defendant, The Hillsboro Bank, by its undersigned attorneys, hereby files its Amended Answer and Defenses and says that:

FIRST DEFENSE TO COMPLAINT

The Complaint filed herein, and each Count thereof, fails to state a claim upon which relief can be granted as to this defendant.

SECOND DEFENSE TO COUNT I

Answering Count I of the Complaint filed herein, and the numbered paragraphs thereof, defendant says:

1. It admits the facts alleged in paragraph one.

2. It admits the facts alleged in paragraph two.

3. It admits that this action arises under Title 12, United States Code, Sections 21, 24(7), and 36, but denies all other allegations in paragraph three.

4. It denies that this Court has jurisdiction of the controversy which is the subject of this action pursuant to Title 28, United States Code, Section 1343, but admits all other allegations in paragraph four.

5. It admits the facts alleged in paragraph five.

6. It admits the fact that plaintiff received the letter described in paragraph six, a true copy of which is attached, but denies all other facts alleged in paragraph six.

7. It admits the fact that plaintiff intends to operate an armored car, and that paragraph 7490 reads as alleged, but denies all other facts alleged in paragraph seven.

8. It admits the facts alleged in paragraph eight.

9. It admits the facts alleged in paragraph nine.

10. It admits the facts alleged in paragraph ten.

11. It denies the facts alleged in paragraph eleven.

12. It denies the facts alleged in paragraph twelve.

13. It denies the facts alleged in paragraph thirteen.

14. It admits the fact that the Constitution, laws and regulations of the United States of America as applicable herein are supreme, but only to the extent the same pre-empt the field of law involved herein. It denies all other facts alleged in paragraph fourteen.

15. It denies the facts alleged in paragraph fifteen.

Except as is hereinbefore admitted, qualified and specifically denied, defendant denies all allegations of Count I of the Complaint.

SECOND DEFENSE TO COUNT II

Answering Count II of the Complaint filed herein, and the numbered paragraphs thereof, defendant says:

1. It realleges all admissions and denials of their answer to paragraphs one through eight inclusive of Count I herein.

2. It denies the facts alleged in paragraph two.

3. It denies the facts alleged in paragraph three.

4. It is without knowledge or information of the facts alleged in paragraph four sufficient to form a belief as to the truth of the allegations therein, and therefore denies the same.

5. It is without knowledge or information of the facts alleged in paragraph five sufficient to form a belief as to the truth of the allegations therein, and therefore denies the same.

Except as is hereinbefore admitted, qualified and specifically denied, defendant denies all allegations of Count II of the Complaint.

THIRD DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant would show unto the Court that the establishment, use and operation of the armored car owned by plaintiff and operated under its direction by its employees for the purposes of receiving deposits and for other banking purposes, and/or the establishment, use and operation of the money receptacle building at a place about a mile from its banking house for the purpose of receiving deposits, constitute branch banking by plaintiff in violation of Title 12, United States Code, Section 36, and Sections 659.06 and 659.52, Florida Statutes, 1965, and the above-described practices and activities of plaintiff are consequently not legally authorized and are illegal and unlawful.

FOURTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant would show unto the Court that by virtue of the establishment, use and operation of the armored car owned by plaintiff and operated under its direction by its employees for purposes of receiving deposits and for other banking purposes, and/or by virtue of the establishment or leasing, use and operation of an off-premises money receptacle for receiving deposits at a place about a mile from its banking house, plaintiff is en-

gaged in the general practice of banking at a place other than that specified in its organization certificate and in branches not established and maintained by plaintiff in accordance with the provisions of Title 12, United States Code, Section 36. Plaintiff therefore is violating the provisions of Title 12, United States Code, Section 81, by engaging in the above-described practices and activities, which practices and activities are not legally authorized, and it is not entitled to the relief sought.

FIFTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant alleges that neither the establishment, use and operation of the armored car operations of plaintiff nor the erection or leasing, operation and maintenance by plaintiff of the off-premises money receptacle building is expressly authorized by the laws of the United States of America, and such practices and activities are not necessary incidents of the banking business or incidental powers necessary to carry on the business of banking or incidental powers existing to carry into effect such powers as are granted by the laws of the United States of America. Said practices and activities on the part of plaintiff are therefore not legally authorized, but are unlawful and in contravention of Title 12, United States Code, Sections 24, 36 and 81.

SIXTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant alleges that plaintiff is not legally authorized to perform its armored car operations and/or establish or lease, use and operate its off-premises money receptacle building by the provisions of paragraph 7490 of *The Comptroller's Manual for National*

Banks and the letter of June 29, 1966, from the Regional Comptroller of the Currency, because the operations allegedly authorized therein, as applicable herein, are invalid, illegal and void, and paragraph 7490 is in contravention of Title 12, United States Code, Chapter 2, Sections 1, 24, 36 and 81.

SEVENTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant alleges that if paragraph 7490 of The Comptroller's Manual for National Banks and the letter of June 29, 1966 constitute valid rulings of the Comptroller of Currency and if the same are otherwise authorized by law, the same nevertheless contemplate and authorize only the use by a national bank of an independent messenger service which is not an instrumentality of the national bank. The same therefore do not authorize plaintiff to furnish such messenger service as an instrumentality of the bank, either under the guise of an agreement that the plaintiff's messenger service is an agent for the depositor or otherwise. The said practices and activities of plaintiff are not legally authorized and are unlawful and illegal.

Amended Counterclaim

Defendant, The Hillsboro Bank, by its undersigned attorneys, files its amended counterclaim against plaintiff and says:

FIRST CLAIM

1. The Hillsboro Bank is a banking corporation organized and existing under the laws of the State of Florida. Its sole place of business and its banking house is at the corner of Evers Street and West Reynolds Street in Plant City, Florida.

2. The First National Bank in Plant City is a national banking association organized and existing under the National Banking Act, Chapter 2, Title 12, United States Code and has its banking house at 302 West Haines Street, Plant City, Florida.

3. The action arises under Title 12, United States Code, Sections 36 and 81.

4. The Court has jurisdiction of this controversy pursuant to Title 28, United States Code, Section 1331; Title 12, United States Code, Sections 36 and 81. The matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

5. This is a proceeding for a declaratory judgment and an injunction pursuant to Title 28, United States Code, Sections 2201 and 2202, and other applicable laws.

6. The Hillsboro Bank has served its customers in Plant City, Florida, continuously since 1902 to the present date. Throughout this period of time, it has transacted its business solely from and on the premises of its banking house located in that city and not elsewhere. It recently constructed and dedicated a new banking house in Plant City from which it now transacts all its business. Upon opening the new building, it discontinued operation from the banking house at which it had served its customers for many years. First National has heretofore, for a period of about ten years, owned and operated a national bank in Plant City, Florida. Until recently it transacted all of its business from a banking house located at 302 West Haines Street, Plant City, Florida.

7. On or about September 27, 1966, First National announced that it would not only perform banking business at its original location, but it would also perform banking business hereinafter described, at locations elsewhere in the city of Plant City and adjacent areas. Pursuant to its aforementioned announcement, First National intends

to transact, and is now transacting, banking business at more than one place of business and at locations other than and in addition to the location of its banking house in Plant City. It is doing so, and intends hereafter to do so, by operation of a receptacle or depository for the receipt of deposits at the Plant City Plaza Shopping Center, which is about one mile from its banking house in Plant City, and/or by operation as its agency or instrumentality of an armored car owned by it and operated by its employees for the purpose of soliciting and obtaining deposits and for other banking purposes at many places away from its said banking house in Plant City, Florida.

8. Plaintiff intends to extend the above-described banking facilities and operations to areas beyond the boundaries of Plant City, Florida, and into areas from which this defendant now draws and obtains customers. Plaintiff is now offering, and intends to continue offering, the above-described banking facilities and operations to the public-at-large, including not only existing customers of plaintiff but to customers of banks chartered pursuant to the laws of the State of Florida.

9. The banking facilities, operations and activities of First National as hereinabove described are not authorized by the laws of the United States of America but are in violation thereof. The above-described facilities, operations and activities of First National constitute banking by and through branches as defined in Title 12, United States Code, Section 36. Said facilities, operations and activities constitute the establishment and operation by The First National Bank of new branches at which deposits are received and checks are paid. Not only are said branches established and operating within the limits of the city of Plant City, in which First National is situated and has its banking house, but also said branches already have been extended into the adjacent trade area.

Under Title 12, United States Code, Section 36, a national bank is prohibited from establishing and operating new branches if such branches are not expressly authorized by the laws of the state in which such practices and activities are being performed. Banking through branches, including the above-described practices and activities which the First National is presently employing, is not expressly authorized by the laws of the State of Florida. On the contrary, branch banking, including the aforementioned activities and practices now employed by First National, is prohibited by the provisions of Sections 659.06 (1) (a) and 659.52, Florida Statutes, 1965. Thus the above-described practices and activities are not legally authorized by the Comptroller of Currency, the laws of the United States or the laws of the State of Florida. Said activities of First National constitute illegal and unauthorized competition with defendant through plaintiff's establishment and operation of new branches, which competition is expressly prohibited by Title 12, United States Code, Section 36, and is in violation thereof.

10. Hillsboro and First National are the only commercial banks doing business as such within the city limits of Plant City, Florida. They compete for customer accounts, deposits, loan accounts and other banking business in Plant City and in the trade area adjacent to Plant City. The above-described new operations and facilities of plaintiff have drawn heretofore and will in the future draw customer accounts, deposits, loan accounts and other banking business from present and from potential customers of defendant, The Hillsboro Bank, thereby causing The Hillsboro Bank to lose banking business which it might otherwise reasonably expect to receive, serve and enjoy. As a result of said illegal and unauthorized competition on the part of plaintiff, defendant, The Hillsboro Bank, has lost and will continue to lose substantial banking business in Plant City and its adjacent trade area because defendant, The Hillsboro Bank is prohibited

by state law from meeting said competition by establishing similar and equivalent operations in those areas. Therefore, defendant, The Hillsboro Bank, is unable effectively to compete with First National for banking business in Plant City and its trade area. The Hillsboro Bank has a right existing pursuant to the laws of the United States of America, and more particularly, pursuant to Title 12, United States Code, Sections 36 and 81, and further pursuant to the laws of the State of Florida, to engage in its banking business free from the competition of the illegal practices of plaintiff described hereinbefore. The Hillsboro Bank, and the value of its business in Plant City, Florida, and adjacent trade area, has already been substantially and irreparably damaged because of the aforesaid practices and activities of First National. If the relief sought herein is not granted, its damage will continue indefinitely.

11. The value of The Hillsboro Bank's business in Plant City and its trade area exceeds $10,000.00. Further, the value of and the value to the Hillsboro Bank of the right to transact its business in Plant City and its trade area free from the aforesaid illegal competition of plaintiff, which right The Hillsboro Bank seeks protection and enforcement of herein, exceeds $10,000.00.

WHEREFORE, defendant, The Hillsboro Bank prays:

(a) That the Court take jurisdiction of the parties and subject matter hereof.

(b) That the Court enter a judgment declaring and adjudging that the above-described practices and activities of plaintiff in operating and using its armored car off-premises, and the above-described practices and activities in operating and using its off-premises money receptacle building, constitute operation of branches in violation of Title 12, United States Code, Section 36, and further in

violation of Section 659.06 and 659.52, Florida Statutes, 1965, in combination with Title 12, United States Code, Section 36.

(c) That the Court enter a judgment declaring and adjudging that the letter of June 29, 1966, referred to in paragraph 6 of Count I of the Complaint and paragraph 7490 of The Comptroller's Manual for National Banks, referred to in paragraph 7 of Count I of the Complaint do not constitute lawful authority for the off-premises armored car operations of plaintiff and/or for the off-premises money receptacle building of plaintiff.

(d) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, The First National Bank in Plant City, Florida, its officers, directors, employees, agents, and/or assigns from operating and using its off-premises armored car and its off-premises money receptacle building, all of which activities and practices are more fully described herein, and further from engaging in such other and similar practices and activities as do violence to the law of the United States of America and/or the laws of the State of Florida.

(e) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, The First National Bank in Plant City, Florida, its officers, directors, employees, agents, and/or assigns from seeking authority from the Comptroller of Currency to engage in branch banking by operating and using its off-premises armored car, and further by operating and using its off-premises money receptacle building according to the activities and practices more fully described herein.

(f) That the Court dismiss the Complaint of The First National Bank in Plant City, Florida, filed herein.

(g) That the Court grant such other and further relief as it deems meet and proper.

SECOND CLAIM

1. Defendant, The Hillsboro Bank realleges, and by reference makes a part hereof, each and every allegation in paragraphs 1 through 8 and in paragraph 11 of the First Claim hereof.

2. By performing the above-described activities and operations, First National is engaging in the general business of banking, including the receiving of deposits, at places other than 302 West Haines Street, Plant City, Florida, and at places other than branches established and/or operated or maintained by plaintiff in accordance with Title 12, United States Code, Section 36, in violation of Title 12, United States Code, Section 81. As has been previously alleged in the First Claim herein, the establishment, operation and maintenance of branches of the First National Bank in Plant City is not valid or authorized under Title 12, United States Code, Section 36.

3. Said activities of First National are not legally authorized by the Comptroller of the Currency, the laws of the United States or the laws of the State of Florida.

4. Said activities of First National constitute illegal and unauthorized competition with defendant through plaintiff's aforesaid performance of the general business of banking at places other than 302 West Haines Street, Plant City, Florida, which places are not branches established or maintained by plaintiff in accordance with the provisions of Section 36 of Title 12, United States Code. As a result of said illegal and unauthorized competition on the part of plaintiff, defendant has lost and/or will in the future lose substantial banking business because defendant is prohibited by state law from meeting said competition by similarly performing its general banking business at places other than that at which it now is located. Therefore, defendant is unable effectively to compete with First Na-

tional for banking business. The Hillsboro Bank and the value of its business, has already been substantially and irreparably damaged because of the aforesaid practices and illegal competition of plaintiff. If the relief sought herein is not granted, its damage will continue indefinitely.

WHEREFORE, defendant, The Hillsboro Bank prays:

(a) That the Court take jurisdiction of the parties and subject matter hereof.

(b) That the Court enter a judgment declaring and adjudging that the above-described practices and activities of the First National Bank in Plant City in operating and using its off-premises armored car and in operating and using its off-premises money receptacle building, violate Title 12, United States Code, Section 81.

(c) That the Court enter a judgment declaring and adjudging that the letter of June 29, 1966, referred to in paragraph 6 of Count I of the Complaint and paragraph 7490 of The Comptroller's Manual for National Banks, referred to in paragraph 7 of Count I of the Complaint do not constitute lawful authority for the off-premises armored car operations of plaintiff and/or for the off-premises money receptacle building of plaintiff.

(d) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, The First National Bank in Plant City, Florida, its officers, directors, employees, agents, and/or assigns from operating and using its off-premises armored car and further from operating and using its off-premises money receptacle building in accordance with activities and practices more fully described herein, and further from engaging in such other and similar practices and activities as do violence to the laws of the United States of America and/or the laws of the State of Florida.

(e) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, The First National Bank in Plant City, Florida, its officers, directors, employees, agents, and/or assigns, from seeking authority from the Comptroller of Currency to engage in branch banking by operating and using an off-premises armored car and further by operating and using an off-premises money receptacle building pursuant to the activities and practices more fully described herein.

(f) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, The First National Bank in Plant City, Florida, its officers, directors, employees, agents, and/or assigns, from transacting business in a place other than that specified in its organization certificate and from branches not established and maintained in accordance with the provisions of Title 12, United States Code, Section 36.

(g) That the Court dismiss the Complaint of The First National Bank in Plant City, Florida, filed herein.

(h) That the Court grant such other and further relief as it deems meet and proper.

Carlton, Fields, Ward,
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Attorneys for Defendant The
Hillsboro Bank
Post Office Box 3239
Tampa, Florida 33601

By /s/ Sylvia Walbolt, for
Wm. Reece Smith, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title Omitted)

DEPOSITION OF WILLIAM C. MERIWETHER —FILED FEBRUARY 21, 1967

• • •

Deposition of WILLIAM C. MERIWETHER, taken at instance of defendants State Banks this 7th day of February, A. D., 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at the offices of Edwards and Sawyer, 105 South Evers Street, Plant City, Florida, beginning at the hour of 1:30 P. M.

Thereupon the said

WILLIAM C. MERIWETHER,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Will you state your full name, please, sir? A. William Crawford Meriwether.

Q. And where do you live? A. 903 North River Street, Apartment B.

Q. Plant City ? A. Plant City.

Q. What is your age? A. Twenty-two.

Q. What is your present occupation? A. Teller-Messenger for The First National Bank.

Q. How long have you been employed by the First National Bank? A. Well, a little less than a year.

Q. When were you first employed by the First National Bank? A. Christmas 1965, part-time, and then full-time, I believe, somewhere around March or April.

Q. What were your first duties when you were employed by the bank? A. Miscellaneous duties during the Christmas holidays.

Q. When you began to work full-time, what were your duties? A. Teller.

Q. Did you receive any training in order to perform your duties as teller? A. Yes, sir.

Q. Where did you receive it? A. At the bank.

Q. Who trained you? A. Mr. Randall Hinson.

Q. And what position does he hold or did he hold at the bank? A. He's a teller—cashier? Assistant Cashier. He's more or less in charge of our drive-in windows.

Q. Are you related to Dr. W. G. Meriwether? A. Yes, sir. He's my father.

Q. And Dr. Meriwether is a member of the Board of Directors of the First National Bank, is that correct? A. Yes, sir.

Q. How long did you serve as a teller for the First National Bank at its main banking house? A. I can't give you an exact length of time. It's several months.

Q. And did there come a time when you undertook different duties? A. Well, yes, sir, more or less. When we first got the truck, I was going through learning the procedure for that.

Q. By "the truck," you're referring to the armored car service? A. Yes, sir.

Q. And do you presently work on that armored car? A. Yes, sir.

Q. How long have you been working on it? A. Since the end of October, I believe.

Q. 1966? A. 1966.

Q. Is that when it began to operate? A. Well, you could roughly say it began to operate really the first of November.

Q. But you've been working on it ever since it began its operation? A. Yes, sir.

Q. Are you permanently assigned to working on it, so to speak? A. Yes, sir. I'm more or less in charge of it.

Q. Who else works on it with you regularly? A. A driver and guard is Mr. Alton Goodwin.

Q. Does anyone else work on it regularly besides the two of you? A. On Saturdays we have relief shift, different men who are officers of the bank and tellers of the bank who will relieve us on Saturdays and relieve the run.

Q. Do they relieve both you and Mr. Goodwin? A. No, Mr. Goodwin usually drives. If he wants off, I drive.

Q. Would it be true to say that either you or Mr. Goodwin always drive? A. Yes, sir, or Mr. Ronnie Sparkman, yes, sir, just about, because see we looked it up in the Florida Driver's Handbook and a truck that weighs over nine thousand pounds is restricted to a driver with a chauffeur's license and Mr. Goodwin and I and Ronnie Sparkman are the only ones that I know of in the bank with a chauffeur's license.

Q. Does Mr. Sparkman work on the car except as a relief person? A. He's worked as a driver once.

Q. Just for one day? A. Yes. That was for a charity drive.

Q. For what? A. I believe it was a charity drive. He accepted a locked bag. I don't know what it was for. I didn't work that day.

Q. Which charity drive was this? A. I'm not even sure. I didn't even work on it or have anything to do with it.

Q. About when did it occur? A. It was one Sunday. I don't know when it was. The setup—it was—the money

was turned into the 7-Eleven Stores which are our customers and have a contract with us and I believe they asked if we could pick it up and just hold it for them and then they came in Monday morning and we worked it up for them and they made their deposit there in the bank.

Q. You referred to the 7-Eleven Stores as a customer. Are they different from the Shop and Go Stores? A. No, sir. It's just a different chain under a different name. They're known as 7-Eleven Stores that are here in Plant City.

Q. They are essentially the same thing? A. Type, yes, sir.

Q. Are you deputized by the Sheriff of Hillsborough County? A. Yes, sir.

Q. In connection with your work on the truck? A. Yes, sir.

Q. Do you actually carry a firearm with you? A. I have at times. I don't always.

Q. Do you keep one aboard customarily, although you don't carry it? A. Yes, sir.

Q. And is Mr. Goodwin also armed? A. Yes, sir. He's armed at all times.

Q. And he wears a gun, is that right? A. Yes, sir.

Q. Does Mr. Goodwin have prior law enforcement experience? A. Yes.

Q. And is he also a Deputy Sheriff? A. Yes, sir.

Q. Are any other people in the bank deputies who work on the truck? A. Mr. Charles Futch.

Q. Are there people who work on the truck sometimes who are not deputies? A. Yes, sir, but they never carry a firearm.

Q. And when they're working, I take it there is somebody aboard who is a deputy and who does have a firearm? A. Yes, sir.

Q. What time do you report to work? A. I get there about 7:30 in the morning.

Q. What time does the truck customarily leave on its duties? A. 9:30. Well, I take that back. About quarter to eight we go out and start. We go out and pick up the bags out of the night receptacle and bring them back to the bank so the tellers can open them and work up the deposits.

Q. So you report at about 7:30 and about a quarter to eight you go out to Plant City Plaza and pick up the bags from the depository and bring them back to the bank? A. Yes. We get them out of the receptacle.

Q. And then the bags are opened in the bank? A. Yes, sir.

Q. Do you participate in that? A. Well, I lay the bags out and I have opened them; but it's under dual-control.

Q. That means there has to be two— A. Yes, sir, present when it's opened

Q. —persons present? A. Just as the receptacle is under dual-control also.

Q. Yes, likewise your drive-in depository across the street from the bank is under dual-control, isn't it? A. Depository across the street?

Q. Your drive-in windows? A. Well, they're drive-in windows.

Q. Excuse me, the night depository in the bank. A. Yes. That's under dual-control. That's presently in the building out front.

Q. Right. Now, you've mentioned that you are there and lay out the bags, and you are one of the people on occasions who watches while the money is taken and checks taken out of the bags and accounted for. A. Yes, sir.

Q. Do you actually do that sometimes yourself? A. Yes, sir. I have worked some of the bags, yes, sir, with another teller because I don't have a drawer of my own and we have to put it in his drawer.

Q. Did you have a drawer of your own when you worked in the bank building? A. Yes, sir.

Q. And you are familiar with the procedure by virtue of your prior experience, is this correct? A. Yes, sir.

Q. Now, does Mr. Goodwin have anything to do with the bags which are picked up at the depository? A. He watches and verifies that we picked it up and it's under dual-control and all the bags were removed from the receptacle and he signs the sheet on which the bags are recorded as to the bags which we picked up and that sheet is turned in to the teller to keep with the other records of the bank on the night depository.

Q. Does this sheet list the names of the people who have placed bags in the depository? A. Just the numbers.

Q. The numbers of the bags? A. Yes, sir.

Q. And those bags in turn, the numbers are related to persons who have keys? A. Yes, sir.

Q. And who use the depository? A. Yes, sir.

Q. Now, after you have completed emptying and accounting for the contents of the bags from the depository or receptacle, what then do you do?

MR. EDWARDS: I object to the question on the basis you were talking about the receptacle at the Plaza. Then in Mr. Meriwether's answer he talked about the fact that these were kept with the bags that came out of the night depository at the bank. Now, your question seems to be directed to the night depository at the Plaza; and I am confused and consider that the question is ambiguous.

MR. SMITH: All right.

BY MR. SMITH:

Q. After you finish accounting for the bags which are acquired at the Plant City Plaza receptacle, which I understand you do when you come back from the Plaza first thing in the morning, after that is done, what do you do next, normally? A. After the bags are receipted and they are worked up, we have an electric secretary which our customers, after banking hours, can call in and record what money orders they would like to have their accounts charged for and to be brought to them that day, and I go write down a charge slip as to what they would like.

Q. You go then and hear the recording device and list the names of the persons who have left messages and the amounts of money that they want? A. Yes, sir.

Q. And then you prepare charge slips for the amounts of money? A. Yes, sir.

Q. Does somebody verify whether they have adequate monies on deposit in the bank to cover what they request? A. Yes, sir. I believe it does.

Q. Who does that? A. Well, Mr. Pelham, the Assistant Cashier, is the one who usually knows the accounts and who knows whether they have money to cover it or not.

Q. Well, is Mr. Pelham there with you when you're working up these— A. Yes, sir. He has verified the order. See, we have two tellers. If I record the order and make up the charge slip, somebody else must verify that order as to what's on the charge slip and to the total of the amount and then it's put in a bag and sealed with one of the security seals.

Q. But do they verify it by checking the recording or verify it by counting the amount of money that goes in the bag? A. They verify it by counting the amount of money that goes in the bag and the total that's on the charge slip as to the amount that's broken down on the slip.

Q. What I'm confused about is, at what stage in this does somebody check to see if the person has enough money on deposit? A. Well, he knows the accounts and knows when they're overdrawn and knows which are bad accounts and which are good accounts which usually have a sufficient balance and which don't.

Q. And he is Mr. Pelham who is there working with you? A. Yes. He's in charge of the—I guess you'd say the bad accounts—or has the daily report from the computer as to which accounts are insufficient.

Q. Now, do you ever receive orders for money in any fashion other than from the recording or electronic secretary? A. Yes, sir.

Q. And what other ways do you receive orders? A. By word of mouth when I go in a store like for the next day. They'll call in before—they know what time the truck leaves; and if I like go to the store and they find out they're short on change, they'll call in before we leave and another teller will make up that charge slip.

Q. That call might come to any officer or employee in the bank who then makes up a charge slip and makes available the amount of money which is to go out to them? A. Yes.

Q. And you might be taking that out with your morning orders or you might be taking it because you've come back to the bank and picked it up? A. Yes, sir.

Q. Now, once you have gotten the various orders and start out, do you follow a particular routine as to where you go and who you see? A. Yes, sir.

Q. Do you have a route so to speak? A. Yes, sir.

Q. Who determines that route? A. I do.

Q. Does anyone supervise you in connection with it at the bank? A. With the route?

Q. Yes, sir. A. No, sir.

Q. What do you consider in determining what route will be followed? A. Usually, if—well, like a store will call in and say I really need it, I'll try to get to that store first before I go to the other stores which, as you say, we'll take it in line when I get there. We have no set time to say I'll be there definitely. I have about an hour leeway at each store so I can be late or earlier. When I vary my route, sometimes I run the route in reverse as well as go it in forward. There's no set pattern really. It's just where I want to go. I have the freedom to say which way I want to go.

Q. Do you operate on a general time schedule? A. Yes, sir.

Q. How was that time schedule established? A. Well, after we ran the route with the established customers, the time schedule generally set itself up.

Q. But it was the bank or bank employees or officials who determined the schedule, is this correct? A. Oh, yes, sir. They helped set up the customers as to where they were and by that we tried to organize a certain pattern so as we wouldn't be having to double back and waste time in that manner.

Q. Now, tell me what you do when you start out on your route on a given day? A. Well, we load the orders for the truck and then we check against the charges which we have to make sure all of the orders have been filled. Then I collect the night bags out of the receptacle and the locked bags which I brought in from the previous day's run which will be returned with a validated receipt.

Q. I think you're getting ahead of me, Mr. Meriwether. I'm still in the morning of a given day when you've obtained the bags from the Plant City Plaza and accounted and filled the orders for that day and then you start out in the truck following the route for that particular day. Now, you call on a particular customer, is this right?

A. Yes, sir. Well, see, like the Shop and Go Stores have locked deposit bags. I only validate their receipt having received a locked bag with that amount on it. Well, those bags have been brought in from the day before and they have to be returned with the validated receipt mailed out the day before and I return a bag to the Shop and Go Stores so they'll be ready to go on the truck with the change orders, so that's what I meant by getting the bags ready to go and the orders to load the truck; and then we go from the bank to start out on the route, which is usually out Highway 92.

Q. What kind of a container do you put the money in for John Doe who's called in the day before and said he wants a hundred dollars worth of change? A. Well, it's in a money sack which the bank has. It's just a—

Q. Cloth sack? A. —cloth sack and it has a security seal on it.

Q. All right. Now, when you get to John Doe's place with his hundred dollars worth of change, what do you do? A. I take the bag of change and see if it's a Shop and Go Store, I'll take their bag that I'm returning to them and a receipt slip to them and they will sign a receipt slip for the money and they validate it in my presence. They usually count it again just to make sure it's what they ordered and it's correct and I leave them a copy of a receipt they signed and have a copy for the truck and have a copy brought back to the bank.

Q. Who carries the money from the armored car into the place of business? A. I do, or the teller that's working the run that day.

Q. As I understand, it's generally you? A. Yes, sir.

Q. What does Mr. Goodwin do while you're doing this? A. He stays on the truck.

Q. He stays inside of it? A. Yes, sir.

Q. Now, when you deliver the money to the customer, do you receive anything in exchange? A. I receive a locked deposit bag and they have their deposit slips, but I validate for receipt of a locked bag and I leave a copy with them and I have a copy for the truck and then we have a copy to go in the bank after it's been processed, a copy to be mailed to the store and a copy for the bank.

Q. You just referred to a deposit slip. Are you referring to what the bank calls a transmittal— A. Well, it's a transmittal slip until it gets to the bank and it's validated by the teller and then it becomes a deposit slip.

Q. The same slip is used? A. Yes, sir. It's a transmittal slip.

Q. Do you carry on the armored car at any time a given amount of currency or change which is not assigned to a given person before you start your route? A. No, sir.

Q. Do you make change from the armored car or cash checks from the armored car? A. No, sir.

Q. The armored car has got a glass window on the side of it and a counter which drops down to the outside and two drawers on each side of the counter. What are those there for? A. They've never been used as yet.

Q. What are they there for? A. Well, it could be used that if a customer could come up to the truck and request that we could take their money to the bank and they would have to use one of the transmittal slips and fill it out and we could open that drawer and let them put it in there and it would be pulled back inside and let them have that counter to write on; but, it has not been used as such as yet and I'm not familiar how it could be used.

Q. Have you received any instructions or do you know of any definite plans for making use of it? A. No, sir.

Q. When you call upon a person and make a delivery to him, do I understand that you sometimes get an order

for the next day as to the amount of change that might be wanted? A. Yes, sir.

Q. Do you record that somewhere? A. Usually they will have the store's name and location on it and the amount of change that they want.

Q. On what? A. And the amounts on a slip of paper.

Q. And they'll give you the slip of paper? A. Yes, and I'll bring it back and fill out a charge slip either that afternoon or the next morning.

Q. What kind of piece of paper is this they give you? A. Just a piece of notebook paper or scrap paper, scratch paper.

Q. And you take the notebook paper or scratch paper back to the bank and from that make out a charge slip? A. Yes, sir.

Q. And the charge is made against the account and you deliver the money the next day? A. Yes, sir.

Q. Do you ever make notes yourself of the amount the person wants or do they usually make the notes on a slip of paper and give it to you? A. I have written it down. When they haven't had it out, I would write it down and I would usually write it down so I could record it when I got back.

Q. Do you keep any particular book for this purpose? A. No, sir.

Q. No particular notebook or record or anything like that? A. No. The note is usually destroyed or thrown away after we've recorded on the charge slip.

Q. Have you ever made loans in the First National Bank? A. No, sir.

Q. When calling upon customers while you're working on the armored car, do you accept payments on notes that the customer owes to the bank? A. No, sir, not supposed to.

Q. Have you ever had any tendered to you, any payments tendered to you on notes? A. No. We did have at one time a person who had dropped in a loan payment at the receptacle in a sealed envelope which wasn't opened until we got back to the bank and a letter was sent to the customer explaining that the receptacle in the shopping center could not be used for this.

Q. Was the money returned to the customer on that occasion or was it credited as a payment on the note? A. I don't know. I didn't have anything to do with it after it was turned over.

Q. When a customer wants change or when a person wants change for the next day, do they ever make out a check drawn on the bank and hand it to you? A. No, sir.

Q. Has that ever occurred at all? A. Not that I know of.

Q. Do persons ever hand to you checks and currency to be taken back to the bank? A. Yes, sir, but unless it's in a locked bag, I won't accept loose currency, even if they have the transmittal slips with them. I'd rather have it in a locked bag and that's what we try and furnish our customers with. I have accepted checks which I placed in a transmittal envelope and sealed with the transmittal slips and brought back to the bank from a customer.

Q. When you refer to a transmittal envelope, are you referring to an envelope like this green one that I'm putting before you? A. Yes, sir.

Q. Which we call Defendants' Exhibit 4 for identification? A. Yes, sir.

Q. Is that what you're referring to? A. Yes, sir.

Q. And when you're referring to transmittal slips, are you referring to a document such as the one that I'm

putting before you which is Defendant's Exhibit 3? A. Yes, sir. It's that type.

Q. Have you ever had monies delivered either in envelopes or bags when the transmittal slip was not included or used? A. It seems like there has been a time, but a letter—it seems like that we did and a letter has been sent to the company explaining this can't be done. It was in a sealed envelope. See, when I receive a sealed envelope, I don't open that envelope. I'm using this in reference to the receptacle at Plant City Plaza. I list the customer's name that is filled in on the outside on the sheet which is recorded for the records, and then I just bring the envelopes back and turn them over to a teller who has the records and is in charge of working those up, so I can't truly say.

Q. Do you know of any occasion where the sort of deposit slip which is used at the bank has been used rather than this particular slip called Messenger Transmittal? A. In the very beginning I know of one case, but a letter was sent explaining to the customer this could not be done, would not be accepted, I believe.

Q. Has the messenger car service been used either to receive money, checks or cash items from a customer or from a person or to deliver money to a person who is not a customer of the bank? A. No, sir. The customer has to have a dual-contract signed with the bank before we will service the customer.

Q. This would be true in the case of those who have keys to the depository at the Plant City Plaza? A. Yes, sir.

Q. But it is not true as to others who happen to drop envelopes in that receptacle, is it? A. No, but they they're using the slips and I believe they have a contract on there and the sign out there explains that this is with their permission we do this.

Q. But do I understand that if they sign the dual-control slip, then they don't use the messenger transmittal slip? A. No, sir. They sign that and then we provide a slip for them with their store name, account number. That's a transmittal slip.

Q. If they sign the document which we call Defendants' Exhibit 2 entitled Comprehensive Dual-Control Contract, then thereafter in making use of the depository, the customer does not use this slip which we call Exhibit 3, is that right? A. It's the same type of operation except they don't have to fill in their name and address. We have it already printed on the side with their account number, but it is labeled the Messenger Transmittal Slip with the contract on the back of each slip. It's in a book.

Q. Just so I have this straight in my mind, as I understand it— A. To my knowledge—

Q. Excuse me. Let me see if I have it right, here. A. All right.

Q. If a person has a key to the facility at Plant City Plaza and have signed the—they will have signed the Comprehensive Dual-Control Contract, right? A. Yes, sir.

Q. Then they are supplied with a book of messenger transmittal slips with their name printed on them, but otherwise similar in form and content to this document called Defendant's Exhibit 3? A. Yes, sir.

Q. And then those persons put their night bag in the facility at Plant City Plaza together with one of their slips? A. Yes, sir, with at least three of their slips.

Q. Duplicates or copies, in other words? A. Yes.

Q. If, on the other hand, a person does not have a key to the facility at Plant City Plaza, then they can still put either money or checks in the green envelope which we call Defendants' Exhibit 4 along with one of the messenger slips and drop it in the receptacle at Plant City Plaza and

the truck would then pick up both the envelopes and the bags, is this correct? A. Yes, sir.

Q. And take them back to the bank? A. Yes, sir.

Q. Have you ever been on the armored car when it went to Turkey Creek High School or to any of those schools in that complex at Turkey Creek? A. Yes, sir.

Q. Is there someone or some organization there which is a customer of the bank? A. Yes, sir.

Q. Do you know this as a fact? A. Yes, sir.

Q. Well, what I want to know, Mr. Meriwether, are you sure that the person whom you called upon in the Turkey Creek complex was then a customer of the bank? A. I believe to my knowledge I thought they were a customer. Turkey Creek High School does have an account at the First National Bank.

Q. So at least so far as you knew you were serving a customer as distinguished from a member of the public who did not have an account at the bank? A. Yes, sir.

Q. Now, do I understand that the general range of territory in which the armored car works is west to Mango and south to Highway 60 and southwest to Pleasant Grove and north to the city limits of Plant City and east just across the Polk County line into Polk County? Is that the general area of operation? A. Yes, sir. I believe you'd say northeast out to Fletcher's Milling, also.

Q. How far is Fletcher's Milling outside of Plant City? A. I can't really say, two or three miles.

Q. What is the furthest point, in your judgment, that you routinely serve outside the city limits of Plant City? A. 92 and Williams Road to the west.

Q. About how far is that? A. Well, that's about three-tenths of a mile farther from Mango is Williams Road and then turn back on Williams Road back to 92 and that's another two or three miles.

Q. That's what, eighteen miles? A. Something like that.

Q. How far is Pleasant Grove from Plant City? A. I don't know. I've never really checked the mileage, so anything I would tell you on that would be just about pure guess.

Q. Do you know of any occasions when the armored car has been used for any purpose other than delivering money to customers or receiving from customers checks or cash? A. You mean—well, I said something about the time I didn't work the charity fund. We picked up from a 7-Eleven Store.

Q. Yes. A. But they're a customer. I don't know of any other instance where money or anything has been handled.

Q. Is the armored car used to deliver cash letters from the First National to the Hillsboro Bank? A. Yes, sir, it is. It's used to transport whoever takes it.

Q. Is this done routinely? A. One week they come to us and one week we go to them.

Q. And the weeks that you go to them, you use the car? A. Yes.

Q. Is this on a daily basis? A. Every day except Monday and twice on Friday.

Q. Have you ever worked on the armored car on Saturdays? A. Yes, sir.

Q. Does the armored car ever receive on Saturdays orders on that day from customers for money? A. How do you mean?

Q. Well, I mean— A. Well, they will have called in and I don't remember anyone having a note or anything with a change order to be filled out or charged out after I got back to the bank. I don't remember it happening on a Saturday.

Q. What I really want to know is on Saturdays you do make up orders to be delivered on Saturday. This is correct, isn't it? A. Yes, sir, if they're on the recorder.

Q. And you make these up on Saturday morning before you go out to serve the customers? A. Yes, sir.

Q. And at that time it's necessary to make up a charge slip against the account? A. Yes, sir.

Q. Now, do you follow on that day the same procedures that you follow during week days? A. Yes, sir.

Q. Is there somebody familiar with the accounts who is present at all times? A. Yes, sir, I believe so. I believe they'd know whether they were a non-sufficient account or one that would have the funds in the account.

Q. Is this why it's always an officer who relieves on Saturdays? A. No, sir. I don't know any particular reason why it is an officer. It's just divided between the men of the bank that would have knowledge to handle the funds and the daily routine.

Q. Well, is it in fact an officer who generally relieves on Saturdays? A. Yes, sir.

Q. Do officers ever travel during the week days with you on the armored car? A. No, sir. Well, Mr. Rickert has ridden with us, but not of any set routine. He just went along for the ride, I guess you'd say.

Q. Well, he's ridden on it from time to time perhaps to familiarize himself, but he's not there regularly? A. Yes, sir.

Q. And my question is, does any officer ride periodically or regularly with you? A. No, sir.

Q. Does anybody ride with you to make calls on the customers as a business courtesy? A. No, sir.

Q. Have you had anything to do with soliciting business from customers to use the depository or the receptacle at Plant City Plaza, or to use the armored car? A. Yes, sir.

Q. What have you had to do in that connection? A. Well, people that I know that are accounts of ours, I would explain the truck and the procedure to them.

Q. Do you do this while you're on the truck or at some other time? A. It's usually during free time or no particular time. It's just you run up on someone or you might hear them say—having made a comment about well, they need money or something and having trouble running back and forth to the bank.

Q. Have you obtained any accounts in this connection? A. Yes, sir.

Q. Did you receive any instructions from officials of the First National Bank or anyone else as to what presentation you should make when talking to customers about the receptacle or depository? A. Yes.

Q. Or the armored car? A. Yes, sir.

Q. Who's instructed you in this regard? A. Mr. Rickert and Mr. Edwards and Mr. Pelham.

Q. Has this been done in formal meetings or informally? A. Formal meetings.

Q. Where persons concerned with the operation were all brought together for the discussions? A. Yes, sir.

Q. What were you directed or told at these meetings? A. To make sure that the customer understood that when this money was brought to the bank it was not a deposit until it got to the bank and we were merely acting as their agent in transporting it; but, I believe, a special insurance policy had been set up to provide insurance for their money as soon as we receipted as having accepted it.

Q. Were you given any instructions as to what constituted an agency? A. An agency?

Q. Or constituted the concept of agency? A. Agent?

Q. Yes. A. No, sir.

Q. You weren't given any legal education then? A. No.

Q. Well, now, when you talk to these customers to seek to interest them in using the service, what do you communicate to them or what have you communicated to them? What have you said to them? A. That—first—I try to find out, I believe, if they have an account with us and I tell them we're providing this service for our customers for the ones that would like to sign up, and that we're the agent for them and we handle their money and carry it to the bank and it is insured as soon as we accept it from them, but it's not a deposit until it gets to the bank, and, in addition, we have a service where they can call in and order change and it is charged to their account and brought out to them.

Q. Where you use the term "we" there, you mean the First National Bank? A. Yes, the messenger service, really.

Q. Do you tell them who owns the armored car? A. Yes, sir.

Q. Do you tell them who pays the people who are on the armored car? A. Well, they know we're employed by the First National Bank. I don't go as much as to say we get paid by the First National Bank for doing it.

Q. But you assume they have that knowledge? A. Yes, sir.

Q. That you are there as representative of the First National Bank? A. Yes, sir.

Q. They don't have any trouble identifying you as being employed by the bank? A. No, sir.

Q. Does the armored car have any signs or words on it that associates it with the bank? A. Yes, sir.

Q. What words appear on it? A. First National Bank Messenger Service.

Q. "Messenger Service" appears on the window, right? A. Yes. I've never really paid much attention to the wording on the side of the truck.

Q. Has it been changed at all since the operation started? A. No, sir.

Q. Have your instructions regarding the service to be rendered changed any? A. No, sir, just re-emphasized.

Q. Have you—has there been any change in the services which were contemplated being offered? A. No, sir, not to my knowledge.

Q. What do you tell the potential customer regarding charges for the service? A. There are none as yet.

Q. Do you actually tell them there are none as yet? A. Yes, sir.

Q. Do you indicate there may be charges? A. Yes, sir. I go in and tell them the charges will be set up as we see how successful the service is and whether or not we can keep the truck, really.

Q. You actually say that to potential customers? A. Yes, sir.

Q. Do you convey to them the idea that a charge ultimately will be made for the service, or that maybe it will be made? A. Yes, sir. The only thing the customer is charged for as yet is the deposit on the bags, locked bags which they have.

Q. Are you in a position to state whether there will, in fact, be a charge made in the future? Do you know that as a fact one way or the other? A. There will be.

Q. How do you know that? A. That's what they said in the meeting.

Q. In other words, the meeting where Mr. Rickert and Mr. Edwards and others were advising you, they told you there will be a charge? A. Yes, sir.

Q. Which will be fixed after some experience is gained in the operation? A. Yes, sir.

Q. Have you been told when that charge is going into effect? A. No, sir.

Q. Do you know of any other uses which have been made of the armored car, other than those that we have described including the delivery of the cash letter? A. Yes, sir.

Q. What? A. We delivered some strawberries with it.

Q. Who did you deliver them to? A. Three banks in St. Petersburg to certain officers of the bank, I believe, and to a private realty concern and to Tampa to Tampa Electric, to General Telephone, to Marine Bank, to the Chamber of Commerce, to WFLA, to the paper—

MR. EDWARDS: I think this is far enough, Reece. I object to that. I think the question was improper to start with.

BY MR. SMITH:

Q. Is the truck ever used to move supplies? A. Not that I know of.

Q. You are familiar, I assume, with the area behind the vault or receptacle or depository, whatever one wants to call it, at Plant City Plaza? There's an area in behind it. A. Yes, sir.

Q. What's in that area? A. I don't know as yet. I believe the electrical contractor was using it as a storage area. Then the Merchant's Association—

Q. I think you misunderstand my question. A. Oh, you mean the glassed in area?

Q. Yes, the glassed in area. A. Just for us to go back there and get the stuff out of the vault.

Q. Well, is there anything else back there? Is there a telephone back there? A. Yes, sir.

Q. What use is made of the telephone? A. No use, really. I've called the bank and asked questions but not necessarily pertaining to any accounts. I just check in and out with them, let them know I'm at the shopping center, something like that.

Q. Are there any materials kept back there, extra slips or extra envelops? A. Yes, sir.

Q. Whose duty is it to see that those slips are put back there? A. The colored handyman.

Q. And whose duty is it to see that they are taken from the back and put out front on the table? A. The colored handyman does it, but I check it each morning to see that there's sufficient supplies out there. If he thinks they're low in any division, then he'll fill them up.

Q. And I understand he's assigned to go out there and clean it up? A. Yes, sir.

Q. And do these things on a daily basis? A. Yes, sir.

Q. Do I understand that in behind this area there's an additional space? A. Yes, sir.

Q. Which is also leased by the bank? A. Well, see, the whole space has to be leased by the bank. I don't think that they'll cut it up in pieces to lease it. I'm not really familiar with what the conditions under the lease are.

Q. Well, anyway, there's an area in behind this back wall which is under lease to the bank and is being put to some use, storage or otherwise by other people, electrical contractor you mentioned. A. I can't really truly answer that. He was because it was just an open area. It wasn't fixed up or anything.

Q. Well, was there access to that area from the back side, or was it from this side? A. From the back side. That wall is solid.

Q. Do you know if there are any plans which presently exist for making use of that additional area back there? A. No, sir.

Q. Is the facility at Plant City Plaza and the armored car advertised either in printed materials or by word of mouth as a service or as one of the services of the First National Bank? A. Yes, sir, I believe so.

Q. And are you familiar with any advertising which has been used in connection with these two facilities, the armored car and the Plant City Plaza facility? A. No, sir. I'm not really familiar with it. I see it and just general information. It's common knowledge to all the officers.

Q. Have you been told in your conferences where you were being advised about the nature—the use of the armored car and the facility at Plant City Plaza of any plans for extending the services beyond those that are presently offered? A. Well, what do you mean by "extending?"

Q. Well, offering more services than those which are presently offered. I understand presently you will deliver money to customers of the bank and you will pick up from customers of the bank checks and money and take them back to the bank. This is essentially the service presently being offered, isn't it? A. Yes, sir. It's the customers' money.

Q. Yes. My question is, have you been instructed or heard any discussions about offering more services than those services? A. No, sir.

Q. Either to the public or to the bank's customers? A. No, sir, not that I know of, other than just extending the service to more customers.

Q. Well, have you been present at any discussions regarding cashing checks from the armored car? A. Other than told that there wouldn't be any funds on there to do it and we weren't supposed to do it.

Q. You haven't been present when that service was affirmatively discussed? A. No, sir.

Q. Have you been present at any discussion regarding selling Government bonds or traveler's checks from the armored car? A. No, sir.

Q. Would it be fair to say that you are aware of no plans to expand the service over and above what it is now except to try to extend it to more customers? A. That's what I believe.

Q. Have you heard any discussion about expanding it in terms of territory to reach further out to more people? A. Not that I really know of as a fact. I had several customers—one in particular, that wanted us to go down to Brandon and we told him we couldn't do it as yet.

Q. Did you tell him also if your customers picked up between here and Brandon that you hoped to be able to do it at a later time? A. Wait a minute. I got lost.

Q. You said you couldn't do it as yet. Did you indicate to them that you might be able to do it in the future? A. I told him I didn't know.

Q. You couldn't tell him you didn't know. A. Well, I told him that no, we couldn't go to Brandon and pick up his money because we felt—

Q. Did you say as yet you couldn't or not? A. I could have. I can't remember my exact wording.

Q. Mr. Meriwether, my question is simply, did you indicate to that customer that you would like to do it at some future time? A. Yes, sir. I know the man personally and I'd like to help him if he needs it. I think it's a good service so I think he needs it.

Q. Were you consulted in any way about the design of the armored car? A. No, sir. I was told about the hopper on top of the safe, that the safe wouldn't be open, that

all you'd have to do is flip a lever and the bag would drop in the safe and it would be opened when we got back to the bank.

Q. Do you have a key to the combination on the safe that's on the armored car? A. Yes, sir.

Q. What other persons have keys, to your knowledge? A. No, one. There's one other key that's kept in the bank on the master key ring. It's a vault key.

Q. And you keep a key with you on the truck? A. Yes, sir.

Q. Do you also have the combination to the safe? A. Yes, sir.

Q. Then you could, if necessary, or you desire to, get into the safe on the truck while it was out in the field, so to speak? A. Yes, sir.

Q. Have the volume of the customers which you call upon and serve in the armored car increased since the service has been offered? A. Yes, sir.

Q. Do you know, of your own knowledge, any persons who were banking at other banks who have begun to bank at the First National because of the service? A. One.

Q. Pardon? A. One.

Q. How do you know about that one? A. I don't know if it is a fact. It's just like you say a rumor. It's unsubstantiated by fact. I know she was banking at the Hillsboro Bank and then she changed to the First National Bank and signed up for the service and I assumed that's why she changed.

Q. Well, now, when I asked you the question you said you knew of your own knowledge of one. A. That's what I meant. My own assumption is—I wouldn't want to swear to it as saying that I heard it as a definite fact that she switched because we were offering this service. She told me—it's the Pleasant Grove Grocery and she told me

one time that she had need of a service like this and she would have to carry large amounts, her daughter had, from the bank to the store because she cashed checks and she was very glad she had this service and was real pleased with it and hoped it wasn't inconveniencing us, and I told her it wasn't, that anytime she wanted it to let us know.

Q. I take it you were out there after she had opened the account with your bank? A. Yes, sir. This was afterwards.

Q. Do you know of any accounts that you serve that split accounts between your bank and the Hillsboro or other banks in the area? A. No, sir.

Q. I understand that there is a radio phone on the armored car. Is this correct? A. Yes, sir.

Q. Who calls you over that phone or who do you call over that phone? A. I call the bank.

Q. Does the bank call you as well? A. Yes, sir.

Q. You don't call customers or receive calls from customers over that phone? A. No, sir.

Q. Mr. Meriwether, just one other question I want to be sure about. You mentioned the use of the armored car on a Sunday to pick up monies which had been left at these 7-Eleven type stores in behalf of a charitable drive and as I understood your testimony, you said that the bank was asked or the armored car service was asked by that chain of stores if it would come by and pick up this money, is that right? A. Let's put it this way, I didn't work that day and everything I said is purely hearsay.

Q. Well, what is your understanding of it by virtue of the hearsay?

MR. EDWARDS: Well, now, at this point I object to this—

MR. RICKERT: Can I clear it up?

MR. EDWARDS: No. I just object. Hearsay is not admissible and, therefore, the answer is not admissible. He disqualified himself as being able to give knowledge. Now, if you want to put Bill back on the stand—

MR. RICKERT: I really don't know, but I'll try to find out.

MR. SMITH: Well, I'm entitled to ask hearsay. This is discovery deposition just as well as it is in evidence deposition. I'm entitled to go into anything that might lead to— A. All I know for a fact is, the truck was used. It was used for a charity drive. I'm not even sure of the charity drive. It was supposed to go to the 7-Eleven Stores and pick up the money that was left for the purpose of the charity drive and to be brought to the bank for safe keeping where the officials of the drive, which I believe the treasurer of the drive was an employee—

THE WITNESS: Was it Robert Williams?

MR. RICKERT: I don't know.

A. —he is an employee of the bank and asked for safe keeping at the bank.

BY MR. SMITH:

Q. Well, now, you've used the 7-Eleven Stores. I know the armored car calls upon the Shop and Go Stores, but these are two different chains to my knowledge. A. Yes, and we have dual-contracts for both.

Q. With both? A. Yes, sir.

Q. And it is your understanding that at the time the 7-ElevenStore was one of the bank's customers? A. Yes, sir.

Q. And that there was a so-called dual-contract which means that you could open their—deposit their bags? A. Yes, sir.

MR. SMITH: All right. I have no other questions.

MR. EDWARDS: Bill, you have the right to read this deposition after it's typed up and to sign it, or you can waive reading and signing it. I think it would be all right if you want to waive reading and signing. Do you agree to that?

THE WITNESS: Yes, sir.

MR. SMITH: Okay. That's fine. Thank you.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

The witness, WILLIAM C. MERIWETHER, waived the reading and signing of his deposition after his rights under the Rules were explained to him.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF WILLIAM M. RICKERT —FILED FEBRUARY 21, 1967

• • •

Deposition of WILLIAM M. RICKERT, taken at instance of defendants State Banks this 7th day of February, A. D., 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at the offices of Edwards and Sawyer, 105 South Evers Street, Plant City, Florida, beginning at the hour of 11:00 o'clock A. M.

Thereupon the said

WILLIAM M. RICKERT,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Will you state your full name, please, sir? A. William M. Rickert.

Q. What is your residential address? A. 1112 North Pennsylvania Avenue, Plant City.

Q. What is your age? A. Forty-five.

Q. What is your present occupation? A. President of The First National Bank in Plant City.

Q. How long have you been employed by or associated with The First National Bank? A. A little more than ten years.

Q. And during that period of time what positions other than President have you held, if any? A. Cashier, Executive Vice President, President.

Q. And how long have you been President? A. Approximately six years.

Q. As you know, Mr. Rickert, we're concerned here today with certain activities or facilities variously described as the receptacle or depository at the Plant City Plaza and the armored car or armored car service presently operated by The First National Bank.

When were these services instituted? A. On or about September, the last of September.

Q. 1966? A. 1966.

Q. And how long had The First National Bank in Plant City been in operation prior to that time? A. Ten years.

Q. And could you describe generally what growth, if any, the First National has enjoyed during that ten year

period? A. Of course, it started with nothing, and as of this morning, total resources fifteen million—as of Friday, fifteen million two and a half. Fifteen million two hundred and fifty thousand.

Q. I show you a document—

MR. SMITH: Which I will ask the Reporter to mark as Defendant Intervenor Exhibit 1 in connection with this deposition.

(Whereupon, Defendant Intervenor State Banks Exhibit 1 was marked for identification.)

(Exhibits Not Reproduced)

BY MR. SMITH:

Q. —and ask you if that is a publication of The First National Bank? A. Yes.

Q. And in it in the middle pages is a statement of deposits, capital structure, securities, loans and discounts, total assets, together with some comparative growth percentages. A. Yes.

Q. Do those statistics correctly reflect the condition and growth of the bank as indicated? A. Yes. I'd say so.

Q. And do I correctly understand from the comparative growth percentages which are shown in Exhibit 1 that the growth of the bank as to loans and discounts, time deposits, demand deposits and total deposits has, according to information compiled by the Florida Banker's Association, exceeded the average for growth in those categories by banks in the State of Florida and in the County of Hillsborough? A. Yes.

Q. Is this correct? A. Right.

Q. Mr. Rickert, are you personally aware of any customers which The First National Bank acquired solely because of the off-premises receptacle or depository at

Plant City Plaza or because of the armored car service which the bank now offers? A. Yes.

Q. You have obtained such customers for those reasons? A. Right.

Q. Are you aware of any customers which you have obtained for those reasons who prior to that time were doing business with other banks in the area? A. Based on my knowledge, here about two months ago we tried to ascertain this and I think one.

Q. Based on the study you made then? A. Yes.

Q. There's one that you could designate? A. Yes.

Q. Do you mean to indicate by this that there aren't others or that you weren't able to ascertain on the basis of what you had before you? A. I feel that the number of customers—I'm trying to think of the right word here—recruited from other banks have been negligible.

Q. Are you aware of any customers which your bank obtained who were formerly doing business solely with the Hillsboro Bank or the Peoples Bank in Lakeland because of these new facilities. By this, I mean, either that they started doing business with the First National and divided their account or else shifted their account entirely? A. On this survey which we made, one customer which, I believe, we got came from the Hillsboro Bank. Whether there is anything recently, I'm really not certain.

Q. Would it be fair to say that your bank enjoyed an unusually good growth prior to the time that it began to offer the depository or receptacle facility or service and the armored car service? A. Well, on the basis of percentages, we've been exceeding the growth of banks throughout the county generally for several years.

Q. This was done without these new services that we're discussing? A. Yes.

Q. Is this correct, sir? A. Yes.

Q. You made reference to the fact that you had obtained new customers which you believe is due to the service? A. Right.

Q. Which is now being offered. Wasn't it true that before the service was offered you likewise obtained such customers? A. Yes.

Q. Now, could you tell me in point of time when the idea of opening the off-premises receptacle or depository and when the idea of operating the armored car first was taken under consideration by the First National Bank? A. Well, I think, as you know, the Comptroller's ruling on this is perhaps a year old or longer. I'd say we first became serious about it—I shouldn't use the word serious —gave it more active consideration June, July, in that area.

Q. Of 1966? A. In '66.

Q. What prompted the bank's officers to give it more active consideration at that time? A. Well, it's difficult to point to any one thing and say this is what did it. Certainly, the knowledge that such a service was already being rendered in the State of Florida became—put some impetus to our thinking. The knowledge that the Comptroller had made a ruling concerning the erection of—in his language at that time—deposit machines. The knowledge also that some of the information received from some of our services of the prohibitive cost of armored car service for a small retailer. These factors working together, I think, probably began to work and give—then give it very serious consideration.

Q. When you say the knowledge that the service was already being offered. Are you referring to the Panama City situation? A. Panama City-St. Andrews.

Q. Are they two different operations? A. One armored car, two banks, affiliated banks.

Q. Now, you refer to the Comptroller's ruling in this respect. What ruling do you have in mind? Is this the letter from Mr. Schwinn that you're referring to? A. The ruling 7490 has been in the Comptroller's manual for some time. A letter directed from the Comptroller's office in Washington to the Regional Comptroller in Denver also dealt with this information.

Q. Now, was—7490 as I understand it pertains to armored car services. A. Right.

Q. Was the letter which went from Washington to Denver also relating to armored car services? A. I'd have to look to refresh my memory. It may have been about the deposit machines.

Q. Did you receive a copy of it or was it published in some materials? A. I received a copy.

Q. Do you have a copy in your possession? A. No, I don't.

Q. I don't mean here today. I mean in your files at the bank? A. Yes.

MR. SMITH: Bob, I wonder if I can have a look at that at some time?

MR. EDWARDS: I may have a copy of it; and if I can put my hands on it, I'll let you see it.

BY MR. SMITH:

Q. Going back a moment to the survey which you mentioned had been made regarding customers acquired and why they were acquired relative to this service. When was that survey made? A. Approximately two months ago.

Q. And why was it made? A. We do this all the time.

Q. Was it made in any way in connection with this lawsuit? A. Oh, no, sir.

Q. Was it requested by counsel? A. No, sir.

Q. What did you refer to in order to make the survey? What were your basic materials? A. The customers we're serving.

Q. Talking with the customers? A. Oh, no, no, no.

Q. Just looking at the account? A. Just looking at the account.

Q. And applying your knowledge of the community to that? A. Yes.

Q. And I guess applying your knowledge of the banking habits of the community? A. That and, of course, we keep a record of transactions that go through the car.

Q. Now, in the complaint which was filed in this case in behalf of your bank, reference was made to the receptacle or depository off-premises. Reference was also made to the armored car service. In connection with this receptacle or depository, further reference was made to a letter of Mr. Robert L. Schwinn dated June 29, 1966, and a copy of that letter was attached to your complaint.

Is it pursuant to that letter and the authority of that letter that the bank determined that it would undertake the off-premises receptacle or depository? A. We've had two letters from him. One referring—one definitely talking about the receptacle so I assume this is what you're asking about.

MR. SMITH: Do you have a copy of that? You might show it to him.

A. Yes. This is the one about the night receptacle. Information about the—does the Denver letter refer to the deposit machines?

BY MR. SMITH:

Q. I haven't read it, but it seems to do so, yes, by quick scanning. A. Yes.

Q. Well, going back then, as I understand it, the letter of Mr. Schwinn dated June 29, 1966, is the letter upon

which the First National bases its authority to operate an off-premises receptacle or depository? A. That is true. Incidentally, there have been recent—there is a printed Comptroller's ruling now.

Q. Could you identify that more fully for me ? A. It is—would not refer to a night receptacle. It talks about these deposit machines. 7491.

Q. That's paragraph 7491 of the manual of the Comptroller of Currency? A. Right.

Q. Now, do I correctly understand further that the authority upon which the First National instituted the armored car service were the provisions in the Comptroller's manual in paragraph 7490 you just mentioned? A. Yes. Does that have armored car service?

MR. EDWARDS: Yes.

A. Yes.

BY MR. SMITH:

Q. Now, in connection with the depositories did the First National write to Mr. Schwinn and ask his opinion in connection with the contemplated receptacle or depository or was there something published by the Comptroller that prompted the bank to consider it?

MR. EDWARDS: Could I hear that question. I missed the first part of it. Would you read it for me, please.

(Whereupon, the Court Reporter read the pending question.)

MR. EDWARDS: Now, I interpose an objection on the word depository and, as you said, it was not a word of art, that you were simply using that interchangeably with the word receptacle, so I don't have to interpose and Mr. Rickert doesn't have to be on guard in using the word receptacle—

MR. SMITH: I agree with that. I'm trying to use both the words receptacle and depository in order to represent your view and my view of what it amounts to.

MR. EDWARDS: So you concede we identify it as a receptacle, not a depository?

MR. SMITH: I don't contemplate that when I ask questions that I'm asking Mr. Rickert to characterize this as a depository rather than a receptacle.

MR. EDWARDS: Then we won't quibble on it.

THE WITNESS: Now, where were we?

BY MR. SMITH:

Q. I can put it a different way. What started your interest in the depository? Who implemented it first? Was it something which came down from the Comptroller's office or was it something that the First National decided it wanted a ruling upon and sought a ruling? A. Well, we sought the ruling. In other words, our information came from the Denver letter.

Q. Yes. A. And what—this talked about deposit machines.

Q. And you analogized from that letter to the program that you would like to present and asked an opinion on that? A. Yes. In other words, does—is a night receptacle a deposit machine, in effect, is what we were asking. Frankly, we wanted to make certain that we would be operating this within the scope of what the Comptroller's ruling was.

Q. What sort of advertising program did the bank undertake in connection with the receptacle or depository facility and the armored car facility? A. It would be difficult to enumerate; but to generalize, we've called the service, which I take to include the armored car and the

receptacle, the Bank Messenger Service. To enumerate the types of—kinds of advertising would be difficult. We spent—

Q. Well, for example, you have published or advertised the service in materials printed by the bank, such as defendants' Exhibit 1 in connection with your deposition? A. Yes.

Q. And you have also published brochures such as this one I'm showing you, which is defendants' Exhibit 1 in connection with the deposition of Mr. Futch? A. Yes.

Q. And in addition to that, has there been radio and newspaper advertising? A. Yes.

Q. And has there been advertising by word of mouth through the Board of Directors of the bank and its officers and employees? A. Oh, I'm sure, yes.

Q. Now, did the bank undertake to solicit customers based upon this new service? A. Yes, sir.

Q. And what sort of solicitation program was followed? A. Oh, I would say some by direct mail, mailing out of these brochures, others by direct solicitation of our people.

Q. Well, was the mailing of the brochures limited to then existing customers of the bank or was it sent to other persons and organizations as well? A. Oh, other people.

Q. Pardon? A. Other people as well.

Q. And was the solicitation by word of mouth also extended to people other than the customers of the bank, the then existing customers of the bank? A. Oh, yes, I'm sure.

Q. Now, does the First National presently lease the site at which the receptacle or depository is located in Plant City Plaza? A. Yes.

Q. From whom does it lease? A. We lease from B. N. F. Incorporated.

Q. And what is the business of that company? A. Solely as a lessee—the lessor from the owner of the property.

Q. It in turn leases from the owner of the Plaza and sub-leases to the bank? A. Right.

Q. And was that corporation created solely for a vehicle to facilitate the sub-lease? A. Yes.

Q. And is it a friendly corporation or a corporation which the bank caused to be created for this purpose? A. Yes.

Q. Who placed the order for the armored car? A. I did.

Q. And how was this done? What were the mechanics which you followed? A. A visit to the manufacturer's place of business.

Q. Where was that? A. Memphis, Tennessee, and consequent order by mail.

Q. Was it necessary to give the manufacturer any specifications for the equipment? A. Oh, some very general type specifications. Actually, it is patterned after a vehicle which they have had already manufactured.

Q. Well, was this a sort of shelf item which they had or did it have to be particularly manufactured for you? A. Well, I understand they have no shelf items. Frankly, the man says he is the largest manufacturer of armored cars in the country, and it is really a very small plant and that all—generally, orders are placed and then cars are built.

Q. What sort of instructions did you give to the manufacturer when your order was placed, in terms of what kind of armored car was required? A. Very frankly, we used the specifications of cars that they had already manufactured for the Bay National Bank and the First National Bank of St. Andrews.

Q. These are what we refer to as the Panama City banks previously? A. Yes, and some minor changes.

Q. Do you recall what the changes were? A. Something about the generator and honestly I couldn't recall.

Q. All right, sir. Defendants' Exhibit 1 in connection with your deposition, on the last page has what I understand to be a picture of the depository or receptacle at the top of the page and in the middle of the page a picture of the armored car. Is this correct? A. Right.

Q. And the picture of the armored car shows a glass window on the side and then in the middle in rectangular form a counter which opens out and on each side of that two drawers which I understand also open out? A. Yes.

Q. So that items could be placed in the drawers.

Why did you order an armored car of that design? A. Because that's the way Bay National's was. Theirs was designed in such a manner.

Q. Well, was there any particular reason you wanted one designed in that fashion? A. Frankly, at the time we ordered this—of course, as you well know, is a new service. I was not sure whether we might want the customer to come to the armored car or whether—and, if we did, this would be a place for him to place his money in the car. Frankly, since then, I don't believe we've ever used them.

Q. That was my next question. A. Right.

Q. Do you know of instances where the customer has actually come to the armored car and that counter or drawers have been used? A. I know of none and I believe you'll find from the people who actually run it, you'll find it's never been used. As a matter of fact, part of it's falling apart and we haven't had it repaired.

Q. Does the bank contemplate any sort of service whereby the customer actually would come to the armored car and use that counter or those drawers? A. No.

Q. Do I understand that in this lawsuit the bank is merely seeking a declaration from the court that it may use the armored car to go to customers and the messenger or teller leave the armored car, go into the customer's

premises and either deliver cash or other items or else remove from the premises cash or other items in the bag—

MR. EDWARDS: I object to that. The declaration which we are seeking is stated in the complaint and we are not intending to limit it by any specific testimony.

MR. SMITH: Well, I'm still unclear on this.

MR. EDWARDS: In other words, I object to the question as phrased; and, as a basis of my objection, say, that the complaint as stated spells out the declaration which we are seeking, and this is the issue before the court, and this witness is not competent now to limit that in any way.

MR. SMITH: Well, as I understand from the complaint, it is not ascertained clearly whether you seek to use the armored car service to deliver money to a customer or receive money and other items from a customer where the messenger goes into the facility or whether the customer comes out. Do I understand—

MR. EDWARDS: The complaint, in my opinion, is broad enough to authorize them to do it in either circumstance and this is what we are seeking to do by our complaint in either instance.

BY MR. SMITH:

Q. All right. That clarifies that point for me, Mr. Rickert; but, as I understand, as a matter of fact presently, regardless of what you're seeking in the lawsuit, presently the customer does not come out to the armored car? A. That is correct.

Q. And I further understand this has never been the case since you began operations in September? A. That is correct.

Q. What persons presently use the armored car service and for what purpose is it used? A. You want a list of all my customers?

Q. No, but first, are there persons who have existing accounts at your bank? A. Yes.

Q. Could any person other than one who had an account open at your bank in any way use the service that's now offered? A. It is for our customers.

Q. Is it contemplated that members of the public could use it in any fashion? A. Other than our customers?

Q. Yes. A. No.

Q. Well, now, how do your customers presently use it? Explain what is done. A. Well, one, in picking up funds for delivery to the bank. They call at the customer's place of business or the night receptacle at the Plant City Plaza, pick up their funds with the transmittal slip, deliver it to the bank. The car also, of course, delivers change to these various people who use the night bag, the money bag drop, deliver currency to them upon request.

Q. Do they limit it to delivering money to those persons who deposit night bags at the Plant City Plaza, or do they also deliver money to other persons? A. It could be to other customers.

Q. Well, in fact, that is done, isn't it? A. I'll have to check that. I'd have to make certain. I'm not certain whether they all have night bags or not. I would believe some that do not have night bags also would have currency delivered to them, yes.

Q. Well, don't you have, for example, a customer at Pleasant Grove Post Office? A. Yes.

Q. To whom you've delivered change or currency as well as picked up monies or items from them? A. We ought to correct it. It's not a post office.

Q. Well, at that site? A. It's a store. Yes. We pick up money or funds with the messenger transmittal and deliver currency to them upon request.

Q. And that customer is eight or ten miles at least from the Plant City Plaza depository? A. Yes. There are several who I am sure do not use night bags.

Q. For example, you also serve Shop and Go stores? A. Yes.

Q. As far west as Mango? A. Yes.

Q. And deliver money to them and pick up monies and other items from them? A. Yes.

Q. Now, who may use the facility located at Plant City Plaza? A. Any customer that has a key, first of all, where the drop is made; and any customer of the bank may use the envelope slot which is there.

Q. And in what fashion do those who have the key to the depository make use of it? A. Well, of course, they sign the contract; what we call the dual—

Q. They sign this card which is called "Comprehensive Dual-Control Contract"? A. They sign this and receive a key to the receptacle. This, of course, permits them to use it.

MR. SMITH: Will you kindly mark this document just identified as Defendants' Exhibit 2 for identification with this deposition?

(Whereupon, Defendant Intervenor State Bank Exhibit 2 was marked for identification.)

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLA.

Messenger Service

COMPREHENSIVE DUAL CONTROL CONTRACT

As agent for the undersigned depositor, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

Under the **Comprehensive Dual Control Contract,** all monies, transported solely in padlocked money bags furnished by bank, shall be opened only under the dual control of two bank's tellers. For this purpose, bank will retain a pass key for depositor's bag(s); a key for each bag will be furnished depositor. The depositor expressly authorizes the service described and agrees to accept the bank's count of monies as final.

The First National Bank in Plant City maintains hazard insurance covering holdup, employee fidelity, etc., for the benefit of the depositor for all amounts delivered to bank's messenger for delivery to bank and for all amounts requisitioned by depositor for delivery from bank to depositor. Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank's messenger for monies delivered to depositor.

The bank acknowledges the receipt of $_____

representing a service charge for _____ bags,

$_____ of which shall be refunded upon the termination of service and return of said bags.

This contract shall remain in full force until terminated by either party.

DI State Banks
Ex. No 2
for Ident.

Date: 1/27/67

J. N. Dreyer

_____
Depositor

THE FIRST NATIONAL BANK IN PLANT CITY

By _____

STATE BANKS EXHIBIT 2 — 91 —

BY MR. SMITH:

Q. Mr. Rickert, I show you the document which we have just marked as Defendants' Exhibit 2.

Do I correctly understand that the use to which that contract is put is that when a bank customer desires to make use of the facility located at Plant City Plaza and obtain a key for the purpose of putting a night bag in that receptacle or depository, that the customer first signs this Comprehensive Dual-Control Contract and at that time then receives a key to the depository? Is this correct? A. That's correct.

Q. Do I correctly understand further that this Comprehensive Dual-Control Contract is similar to those contracts which customers of the bank sign in order to make use of the night depository which is located at the main banking house of the bank? A. It's hard to define similar here. There's an entirely separate contract for such a use.

Q. Well, the document to which we refer as Defendants' Exhibit 2 gives the bank contractually the right to enter the night bag which is deposited. Isn't that correct? A. That is right.

Q. And you have a similar contract giving the bank the right to enter the night bags which are deposited in the night depository at the bank's headquarters? A. In this respect, they're similar.

Q. And they differ in that in the first three lines of the Comprehensive Dual-Control Contract there is the statement that "As agent for the undersigned depositor the First National Bank messenger will transport monies of the depositor to and from the banking house." Is this correct? A. I'm certain this is not in the other contract.

Q. That's not in the other contract? A. No.

Q. But those three lines are the respect in which the two contracts differ? A. No. There are other differences.

Q. Well, in order to save time though, this particular agreement, Defendants' Exhibit 2, is intended to be used in connection with the transmittal slips used for the messenger service? A. Correct.

Q. And is intended to be the authority which the bank has to enter the night bags which are placed in the off-premises depository? Is that right? A. Yes, off-premises receptacle.

Q. Pardon? A. Off-premises receptacle.

Q. Now, do I further understand that in addition to those persons who sign this Comprehensive Dual-Control Contract and obtain a key to the off-premises receptacle or depository that other persons may use that facility who are customers of the bank and have accounts with the bank? A. Yes, sir.

Q. We have been using the terms customers of the bank. Presumably the bank could have customers to whom it makes loans, for example, or has business dealings, but that customer does not have an account with the bank. This is possible I suppose, is it not? A. We erected a sign at the night receptacle pointing out that it is limited or is to be used for transportation of money to and from the bank.

Q. I understand that, but my point is that the bank could have business dealings with persons whom it would call customers even though those persons did not have accounts with your bank? A. Yes. You'd call them loan customers.

Q. Yes, loan customers. A. Yes.

Q. Now, may loan customers make use of the off-premises receptacle or depository at Plant City Plaza? A. We have not designated it as a receptacle for the payment of loans, no.

Q. Have you indicated to loan customers that they could make payments of loans by using that off-premises receptacle? A. No.

Q. Do you know if any have, in fact, done so? A. I think we had one occasion when we found an envelope with money which was difficult to identify. We found this was a loan customer. We wrote to them, told them not to do this again.

Q. And on that occasion did you credit the money which you had received— A. Yes.

Q. —to the payment of the note or the loan? A. I'm sure we did.

Q. Pardon me? A. Yes.

Q. Do I understand that customarily in order to make use of the off-premises receptacle or depository at Plant City Plaza that it is necessary for the person using it to have an account with your bank? A. Yes, sir.

Q. And those persons take this green envelope which is furnished on the premises of the receptacle or depository and complete the information on it, place in it one of the so-called transmittal slips together with cash, checks and what other items they want to transmit to the bank and drop it in the slot. Is that the way it works? A. Yes.

Q. Now, do you receive—we'll call them here payments to savings accounts through this device, as well as checking accounts? A. I don't believe we ever have.

Q. Do you offer this receptacle or depository as available to receive monies for savings accounts? A. None of the forms are designed specifically for savings account customers. They are more specifically designed and intended to be people having checking accounts. However, if a savings deposit were placed in there using the proper transmittal slip, etc., we would accept it.

Q. There are no limitations expressly placed on it then? It is possible? A. Yes. It would be possible for that.

Q. Now, how mechanically are the monies and other items placed in the bags or in the envelopes, received at the Plant City Plaza, how are they handled upon arrival at the bank? A. In accordance with this contract, they're opened in the presence of two people and counted and verified.

Q. Then what happens? A. Of course, there is a third copy there which is placed back in the bag and then delivered back to the customer.

Q. What if the customer is using the envelope instead of a bag? A. We would mail the copy, his designated copy.

Q. So when the funds or other items arrive at the bank, the customer's account is credited with the amount that's there? A. Right.

Q. And there is returned to the customer a verification of the receipt of the money? A. Right.

Q. In the form of one of these copies of the transmittal slip? Is this correct? A. Right.

Q. And then at the end of the month, I assume, he also gets a monthly statement which would show the receipt of the monies? Is this correct? A. Yes.

Q. Now, would you explain mechanically how the messenger service is used first in connection with the off-premises receptacle or depository? A. Well, the armored car goes to the Plaza, employees open the receptacle and then place it in the armored car, deliver it to the bank.

Q. And how is the armored car used, other than in connection with the receptacle? A. By making visits to the customers which have indicated their need of the service.

Q. Is this done on a schedule? A. A schedule of sorts. There are some variations for the reason of safety, in

hours, times that money would be delivered, this kind of thing.

Q. Is it done routinely or daily? A. Daily, yes, six days a week.

Q. And when there is a pick-up from the customer either at the receptacle or a customer elsewhere, they deliver with the transmittal slip either in a night bag or deposit bag or else an envelope, as the case might be, both cash money, currency and checks, is this right? A. Deliver to our customer checks?

Q. No, to the service. A. The customer delivers to us?

Q. Yes. A. Yes.

Q. It could include checks and it could include money as well? A. Right.

Q. Is anything else included? A. No.

Q. I take it that no money is delivered to the receptacle per se? A. No.

Q. But money is delivered to customers at Plant City Plaza and elsewhere? A. Yes.

Q. Pursuant to their call? A. Yes.

Q. Now, are payroll monies delivered in this fashion or is it limited to making change or is the money for any purpose that the customer may wish to use it? A. He'll request currency. What he's going to use it for is immaterial to us.

Q. As a bank official and a knowledgeable citizen, you would be likely to know if there were payrolls involved, would you not, because of the size of it, the nature of the business operation, things of this sort, would you not? Sir? A. You're asking me—

Q. Well, put it another way, Mr. Rickert, do you actually use the armored car service to deliver payrolls to some customers? A. Yes. Yes.

Q. As well as change that might be needed in the business? A. Yes. Yes. Yes.

Q. Now, to your knowledge, is money delivered to customers for any other purpose? A. We don't ask them.

Q. I realize you don't ask them, but, nevertheless, do you know whether— A. I couldn't say. We do not. They call up and request currency.

Q. Now, when they call and request currency, I understand that they make a call directly to the bank which is received either by a bank officer or employee or else is recorded on a device which is present at the bank? A. Yes.

Q. And then in order to honor the request, the bank determines whether the customer has an account of the adequate size to cover the request? A. Yes.

Q. And then causes a debit to be made to the account and the amount of money to be delivered? A. Yes.

Q. And then places this money in a bag or envelope with instructions to the messenger for delivery? A. Yes a charge slip, right.

Q. And a copy of that charge slip goes with the money which is being delivered to the customer? A. Yes.

Q. And another copy is mailed with the monthly statement or the cancelled checks? A. Yes, I would assume so. Yes.

Q. Now, is the customer's account invariably debited before the money is delivered to him? A. Well, as a matter of bookkeeping, we know that we have the actual posting of the account, as you well know, is made the following day.

Q. Is this the standard practice of the bank that the posting of the account even on banking transactions within the bank is made the following day? A. The

actual physical—let's back up a minute. At this point, the actual physical transaction is made at a data processing in the Marine Bank in Tampa.

Q. But you make out the necessary slips beforehand? A. Right.

Q. And when money is being delivered on Saturday, your banking house, the main banking house is not open, is this correct? A. Correct.

Q. And in that instance, the necessary document is filled in by your personnel to show that a debit has been made, but, again, physically that can't be posted and the transaction entered until Monday or Tuesday, is this right? A. Yes.

Q. Is the messenger car service used for making payments on loans? A. No.

Q. Is the messenger or teller assigned to the armored car authorized to accept payment on loans? A. No.

Q. Do customers, in fact, make payment on loans to the messenger or teller? A. No.

Q. Now, in soliciting an account for a customer who will use the messenger or armored car service, who does the solicitation? A. Oh, I'd say—well, frankly, officers and employees.

Q. Do you have persons specifically assigned these duties? A. Yes.

Q. Pardon me? A. Yes. Yes. Yes.

Q. And are they the ones who by and large perform the function of obtaining these accounts? In other words, I realize that occasionally an employee might get word that someone was interested; but your active program of acquiring the customers is carried on by persons specifically assigned this duty who are either public relations employees or officers of the bank. Is this right? A. Yes.

Q. What instructions are they given regarding the armored car service and off-premises receptable or depository? A. Of course, we're very careful to point out to them that this is a messenger service, that to use it specific forms which we have designated must be used and that it can be used only for those purposes.

Q. What instructions are these persons given in dealing with the potential customer? A. Well, of course, to explain what the service is for, explain its use, to invite them to use the service.

Q. Well, there is a contractual arrangement which is involved in these transactions. What instructions are your officers or employees given with regard to this contractual arrangement when discussing it or when discussing the service with the potential customer? A. Well, of course, if they're going to use the night receptacle, naturally, that they must sign this Comprehensive Dual-Contract. Other than that, to use the specified forms that need to be—that we've designated for this purpose.

Q. And this is the extent of what your officers or employees are told to communicate to the customers? A. Well, you naturally, if you're making a call on a customer, you talk about all of the services of the bank. You talk about its advantages. You talk about its convenience. You talk about—all of the services that the bank uses. In other words, when we solicit a customer, we certainly, don't limit him to the use of one service.

Q. I understand that, but— A. And so that—

Q. —in connection with the one service, what are your officers and employees told to say to the customer? A. I go back and say again, that the service is to be used for the transmittal of funds from the customers' place of business to the bank and vice versa. The receptacle at the shopping center requires the use of a bag which is dropped,

or the use of the forms which we've discussed, and that it's for the purpose as outlined on these forms.

Q. Well, is there any—are your people instructed to review the agency relationship with the customer or are your people instructed to ask the customer to consult with his lawyer regarding the effects of the relationship, either one? A. We never talk to them about referring with their lawyer; but, I'm sure, naturally, we'll talk about the use of the forms which are provided and the materials, the advertising materials which you have seen and, of course, on all of these forms we talk about the agency relationship.

Q. I understand that this is so in terms of your printed materials and that the customer is told to use those printed materials; but is there any specific instruction or discussion with the potential customer regarding the legal relationship which is being created? A. Well, we've used the word agency and we point out this does not become a deposit until it comes to the bank.

Q. According to the terms of the documents? A. Right.

Q. Which they are to complete? A. Yes.

Q. Now, if a customer desires to obtain money from the armored car or else deliver money or other items to the armored car, how does the customer go about getting in touch? A. Well, first, as you know, there's to some extent a routine which is now worked out and the customers recognize that they should be calling the bank before the armored car leaves, etc. There is—and if he were to have a currency request while the armored car is on its route, he would call the bank. We have a radio phone on the car. We might request it to come back and pick up the currency.

Q. Would the armored car have additional currency aboard which it could deliver? A. No.

Q. Does this ever occur? A. No, sir.

Q. Does the customer have any direct contact with the armored car? A. No.

Q. The customer, then, must contact the bank headquarters which in turn contacts the armored car? A. Yes.

Q. Does the customer have any control over the routes or schedules which the armored car follows? A. Well, to the respect that he requests the service and then we go there.

Q. But when you go there or what time, he has nothing to say about that except in terms of his stated preference? A. That's right. A general agreement as to when he will need the money.

Q. But it's the bank that makes the decision as to what route the armored car will follow and when it will call upon the customer? A. For the reasons of safety and protection to the funds and the people on the car, we feel it is necessary that we control where it's going to be at what time.

Q. And it's also necessary in order that you make efficient use of the car and not run it off in one direction in one hour and in the same hour run it off in the opposite direction? A. That's right, but if a customer makes a request, we could call the car back to fulfill an order or what have you.

Q. I understand that you could, but it would come back at your direction, rather than at the customer's direction? A. Right.

Q. Is this correct? A. That's correct.

Q. Now, do I correctly understand that the bank holds title to the armored car and owns it? A. Yes.

Q. And that there is permanently assigned to the armored car a Mr. Goodwin who is a driver and a Mr. Meri-

wether who is a teller or messenger depending on one's view of this case. Is this correct? A. I wouldn't use the word permanently, because various people are used.

Q. Well the information I have is that Mr. Goodwin and Mr. Meriwether are assigned to these duties and carry them out generally; but on weekends officers and other employees of the bank relieve Mr. Meriwether. Is this correct? A. This would be generally true.

Q. Normally, and customarily, is anyone else on the car with Mr. Meriwether? Is there, in short, an additional messenger or additional teller, or is it customarily only one? A. Customarily only one.

Q. And do I correctly understand that both Mr. Meriwether and Mr. Goodwin are full-time employees of the bank? A. Yes.

Q. And that they receive their compensation from the bank and receive all the fringe benefits that bank employees are generally entitled to receive? A. Yes.

Q. And that the bank makes withholdings from their salary for Federal income tax purposes, pays Social Security and affords to them Workmen's Compensation coverage? A. Yes.

Q. And is it also correct that the bank has the right, should it see fit or should it become necessary, to discharge these people from their duties or rotate them to other duties? A. Yes.

Q. Does the customer make any payment for the armored car service? A. No.

Q. Has, since it was—the service was first inaugurated, has the customer made any payment for the armored car service? A. No.

Q. Was it ever contemplated that the customer would make any payment? A. In our original announcement I

think you'll find the words "Would you be willing to pay as much as three dollars a week for armored car service?" And we have—at that time there was some contemplation as to whether we would—let me qualify this by saying this three dollars per week would be figured in with the normal service charge arrangement which the bank has with its customers.

Q. You mean paid in addition to or would be part of? A. No, part of. In effect, a customer with sufficient balances to offset these charges would pay no charge whatsoever. We have never charged for the service. We have contemplated it, but no decision has been made.

Q. Is there any reason why you have never made a charge for the service thus far? A. Other than it's a new service being built up. We were unsure of the costs involved, the actual operation of the truck; and, frankly, the number of employees that might be used, etc., so giving it an opportunity to determine the number of customers who might use it—all of these cost factors entered into it, and at this point, we've made no decision.

Q. Were you also unsure whether the customer would be interested in the service if it were required to pay as much as three dollars a month for it? A. We may have been unsure at the time, but not now.

Q. Did Mr. Meriwether receive any particular training in order to undertake his duties on the armored car? A. Oh, yes.

Q. What sort of training did he receive? A. Specific use of how he should, in effect, run and use the vehicle, how it should be utilized, etc. He's had instructions about various safety precautions, that he might take. Essentially this: Safety and the actual process of procedure of accepting these funds.

Q. He was instructed with reference to the use of these documents? A. Yes.

Q. Is it correct that prior to the time Mr. Meriwether began to work routinely on the armored car that he had been a teller employed in the bank? A. Yes.

Q. Now, was Mr. Goodwin hired because of his past law enforcement experience and the fact that he was knowledgeable about firearms and could serve as a guard? A. He was hired as a driver.

Q. Do I correctly understand that he was required to or did obtain status as a Deputy Sheriff? A. I'm not certain whether he is or is not. Frankly, I don't—

Q. Does he carry a gun? A. Yes. Some of our people got county permits. Mr. Goodwin's status, I'm not really certain of.

Q. Mr. Futch advised me earlier that as a matter of fact no permits were obtained but that certain persons were qualified as Deputy Sheriffs so that they would be able to carry guns.

Would Mr. Futch be in a better position than you to know about these details? A. Yes. I'm really not certain.

Q. Could you tell me, Mr. Rickert, what volume of money is now handled on a weekly basis by the armored car service? A. I can, but I'm reluctant to. I feel, as a matter of safety, that to make public the amounts of money which the truck is transporting would be unwise on my part.

Q. You testified in this respect in connection with the hearing for temporary restraining order in this case and that deposition is a matter of public record. I'm quite willing to seal this deposition and we as lawyers and she as a Court Reporter have certain obligations not to disclose information, and I will be willing to put it under a secrecy order, if your lawyer wants it. A. Well, yes. I gave that figure before I thought. Well, it's in the neighborhood of one million dollars.

Q. Well, that was the figure you gave at the preliminary hearing? A. Yes.

Q. Have you had occasion to make a more definite check since then?

MR. EDWARDS: I'm going to object to questions along that line to the extent that the testimony is to the effect that adequate or large amounts of money are being transported, and that the definite details of the operation of the truck involves inquiry into the business activities of the bank rather than touching upon the general authority of the bank to do business, which I understand to be the issue before us here, and I object to the question on that basis.

MR. SMITH: Well, don't misunderstand me. I'm only trying now to find out the volume of business, the amounts of money which are handled weekly and that's all I'm seeking to determine at the moment. The witness did testify in this regard at the preliminary hearing.

MR. EDWARDS: Can we instruct the witness to testify as to whether or not this is generally speaking—I'm objecting to specific amounts being carried on specific days and so forth. A generalization as to the utility of it, I have no objection to, and I understand he's already answered that question in that he has testified that it carries substantially those amounts of money per week. I object to going into it in more depth. This is the nature of my objection.

MR. SMITH: Well, I'm not seeking to obtain business secrets and I will try to respect that. I do feel as if I am entitled to determine the volume of business, because that could have direct bearing on issues of the cause, including jurisdictional aspects of the case.

MR. EDWARDS: I've stated my objection. Would you re-phrase your question and let's proceed?

MR. SMITH: All right.

BY MR. SMITH:

Q. My question is simply, can you state a weekly average or an average on any other periodic basis of the amounts of money which—and other items which are being handled by the messenger-car service?

THE WITNESS: Am I supposed to answer that?

MR. EDWARDS: Go ahead.

A. A million dollars. Did I say a month? I meant a week, one million dollars a week.

BY MR. SMITH:

Q. Have you noticed any trend in this? Is the trend upward or downward since the service got established?

MR. EDWARDS: Now, I object to that on the basis that I consider that as going into business secrets, Reece. We're either doing it or we're not doing it. The scope or non-scope of it is not an issue in this cause, as I understand.

MR. SMITH: Once again, I think the question is appropriate because it bears on an issue in the cause, namely: jurisdiction.

(Whereupon, a discussion followed off the record.)

(Whereupon, the Court Reporter read the pending question.)

MR. EDWARDS: Answer that one, Mr. Rickert.

A. To answer such a question factually, I'm going to have to have records to show. As a banker, to sit here and give opinions of this nature, I feel it would be necessary for me to look at reports, week by week reports.

MR. EDWARDS: Then your answer is you're not able to say.

MR. SMITH: Then, let the record show that I think it will be necessary for me to see the records. Can we work that out?

MR. EDWARDS: No, I'll object to that.

(Whereupon, a discussion followed off the record.)

BY. MR. SMITH:

Q. What instructions, if any, are given those in charge of the operation of the armored car insofar as the territories to be served; or putting it another way, what territory is presently being covered? A. Well, the route generally goes as far east as—far west as Mango; south to Pleasant Grove, I believe it is.

Q. Just for the record, Mr. Rickert, Pleasant Grove is approximately twelve miles south and west of Plant City on the south side of Highway 60, is this correct? A. I don't know. If you say so, I'll agree.

Q. Okay. A. North, it serves no customers north of Plant City, I don't believe. East to one location on 92 and now how far away that is—

Q. It is in Polk County, is it not? A. Yes.

Q. At Winston, Florida? A. Honestly, I can't tell you.

Q. Now, you have given the general range of present operations. Does the bank have any established policy as to how far it would extend the armored car service should customers be available? A. This would have to do with what we consider to be our trade area. Yes. If you were to state it in very simple facts, we would restrict it to our trade area.

Q. And what do you consider your trade area to be? A. East Hillsborough over into the western side of Polk generally. I'd say an area of what we normally refer to as the retail trade area of Plant City, which I think would be defined by just about those areas.

Q. What about Brandon? Would you serve Brandon? A. We've refused to accept a customer in Brandon.

Q. Why did you refuse? A. We felt it was too far away, not in our trade area.

Q. You consider Mango in your trade area? A. Yes.

Q. What about north to the county line near Zephyrhills, do you consider that in your trade area? For example, Central Phosphate has an operation near the county line north of Plant City. Do you consider that in the trade area? A. Yes.

Q. Do you know where Kraft has its plant on I-4 east of Lakeland? A. Yes.

Q. Do you consider that in the trade area? A. Yes.

Q. Do you know where Pinecrest is, south of Plant City? A. Yes.

Q. Do you consider that in your trade area? A. Yes.

Q. Do you know where Fort Lonesome? A. I don't reckon we'll ever go there. Yes.

Q. And do you consider that in the trade area? A. I consider that in the trade area.

Q. Generally speaking, wouldn't it be fair to say that the trade area that you are discussing would be the whole eastern half of Hillsborough County if you drew a line north and south through Mango? A. That would be essentially right, I believe.

Q. And over slightly into Polk County? A. Right. I'll point out it is also a matter of economics in deciding where this car will go.

Q. Would it depend somewhat on the size and volume of the account? A. That is correct.

Q. Is the armored car used for any purpose other than delivering money to customers and receiving money and

checks from customers and returning them to the bank? A. As far as banking purposes, no.

Q. Is it used for any other purpose outside of that? A. Oh, I think we've used it for some supplies and a few things like that.

Q. Is it used to deliver the bank's cash letter to the Hillsboro Bank and any other banks in the area? A. I don't believe we've used it for that purpose. If we did, not to my knowledge.

Q. Are there any restrictions that you know for it being used for delivery of the cash letter? A. I don't know if we've ever discussed it.

Q. Well, are you in a position to deny that it has been used for that purpose? A. As far as I'm concerned it's never been used.

Q. By which you mean if it has, you don't know about it? A. Yes. I have no knowledge.

Q. Has it been used in any way to advertise the bank's services, including the armored car service? A. What do you mean, by distribution of literature?

Q. Well, first, by simply parking it in areas where there are likely to be large crowds, such as the football games? A. Well, it's been used at those places for customers.

Q. How would it be used at a football game for a customer? A. To pick up receipts.

Q. And the customer in that instance would be the Athletic Association or the high school? A. Yes.

Q. The County? A. Not the County. These schools have various acounts, some of which are under the control of the county and others aren't. I can't tell you exactly, but for the use of a customer.

Q. Well, has the service been used to pick up receipts from football games? A. Yes.

Q. And in that instance did the party or organization delivering the money execute a Comprehensive Dual-Control card? A. I couldn't give you the specific—specific relationship. I doubt that a night depository bag was used.

Q. Did the organization which presented the money for those purposes have an existing account with your bank? A. Yes.

Q. Is the Plant City Plaza facility and the armored car service advertised generally as one of the services offered by The First National Bank in Plant City? A. Well, we advertise it specifically on several occasions.

Q. Well, not only specifically, but is it also advertised in connection with other services of the bank as one of the services rendered or as part of the service offered? A. If you're talking about a specific piece of literature—

MR. EDWARDS: Generally speaking, do you include it in the list?

THE WITNESS: Yes, or I don't believe we have a specific listing on it; but orally this is a service that the First National Bank certainly offers.

BY MR. SMITH:

Q. Does the First National offer for sale or sell through the armored car service any bonds or traveler's checks? A. No.

Q. I believe you mentioned that in connection with night bags picked up from the depository that on an isolated occasion there was a payment of a loan which you advised the people not to do any more? A. Yes.

Q. Speaking not of the receptacle or depository but speaking of the armored car service, does the armored car service receive payments on loans? A. No, sir.

Q. From any customers? A. Not to my knowledge.

Q. Now, I understand by your answer there you mean, number one, the service isn't held out to the customer and, number two, it hasn't happened, is that right? A. Certainly never advertised as such.

Q. Does the First National presently have any plans for extending the service offered through the armored car beyond what is presently offered? A. No, sir.

Q. I take it that no one is stationed at the receptacle or depository to explain to those customers who might drop the envelopes in with a transmittal slip and money? A. No.

Q. The agency relationship that is alleged to exist? A. No.

Q. There is merely the statement underneath the depository which the bank has caused to be published there? A. Right.

Q. Do the people assigned to and serving in the armored car wear uniforms? A. No.

Q. Do they have any identifications which they wear or which is attached to them which relates them to the First National Bank? A. No.

Q. Does the armored car itself have any printing on it? A. Oh, yes.

Q. And does it carry any words which connect it with the First National Bank? A. It has the bank's name on it.

Q. In the drawing which is shown on Defendants' Exhibit 1 is shown on the right-hand side of the vehicle simply the words "Bank Messenger Service." A. Right.

Q. Is there other language as well? A. Of course, this was a drawing. "Bank Messenger Service" is in large letters here.

Q. Above the window? A. Above the window. The seal is on the back along with—the seal which you see here is on the back.

Q. The seal which we see on the right-hand door is also on the back? A. Is on the back. It's not on the—well, I don't know. The bank's name is here on the door in that area.

Q. What does it say, "First National Bank"? A. "First National Bank in Plant City".

Q. And the seal which is on the back, FNB, First National Bank, is that the official or adopted seal of the bank? A. Right.

Q. Is there any language written under the initials FNB? A. Full service bank. This, incidentally isn't there.

Q. Is not in the depository? A. No.

MR. SMITH: You may inquire.

MR. EDWARDS: No questions.

Mr. Rickert, you're entitled to have the right to read this deposition and to sign it. You also may waive the reading and signing of it. Do you consent to waiving the reading and signing of it?

THE WITNESS: Yes.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF CHARLES FUTCH —FILED FEBRUARY 21, 1967

Deposition of CHARLES FUTCH, taken at instance of defendants State Banks this 7th day of February, A. D., 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at the offices of Edwards and Sawyer, 105 South Avers Street, Plant City, Florida, beginning at the hour of 9:30 o'clock A. M.

Thereupon the said

CHARLES FUTCH,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Mr. Futch, would you state your full name, please? A. Charles Edgar Futch, Jr.

Q. What is your residential address? A. Route 2, Box 8959, Dover.

Q. Is Dover in Hillsborough County, Florida? A. Yes, it is.

Q. What is your age? A. Thirty-five.

Q. What is your present occupation? A. Bank officer, First National Bank, Plant City.

Q. What position do you hold in the First National Bank in Plant City? A. Vice President and Cashier.

Q. How long have you been employed by the First National Bank? A. Ten years and about four months.

Q. And during your adult years, have you had any other lines of gainful occupation, other than banking business? A. Only one.

Q. What was it? A. Electrical estimator. Need I elaborate on that?

Q. No, I don't think so. A. Okay.

Q. It wasn't anything connected with the banking business or financing? A. No.

Q. What positions have you held in the First National Bank since you were initially employed by it? A. Head Teller, Assistant Cashier, Assistant Vice President. Well, let's see, it would be Assistant Vice President and Cashier and then Vice President and Cashier.

Q. Could you tell us for the record, please, which of those positions, if any, are considered as officers of the bank or to be an official capacity? A. Assistant Cashier is your—actually the beginning of the officer staff.

Q. Then as Head Teller you were not an officer, but when you became Assistant Cashier— A. Then I became an officer.

Q. And from that point on you were an officer? A. Yes.

Q. And how long have you held your present position? A. Two years.

Q. Now, do your present duties and responsibilities in any way relate to the operations of the bank? A. Very definitely, yes.

Q. And in what way do they relate to bank operations? A. As Cashier I'm responsible for the assets of the bank.

Q. Are you acquainted with the facilities which the First National Bank in Plant City offers in the form of an armored car and a depository located at Plant City Plaza? A. Yes, I am.

Q. And how long have you been acquainted with the existence of those facilities or the plans for those facilities? A. I guess from the in—what was it, August or September—August of last year when we initiated it.

Q. Did you in any way personally participate in any correspondence or communications with representatives of

the Comptroller of Currency of the United States? A. Not personally.

Q. Are you acquainted with a letter or letters received by the First National Bank in Plant City from Regional Counsel of the office of the Comptroller of Currency pertaining to the armored car and the depository? A. I am aware of such letters.

Q. They were not addressed to you nor received by you, but you saw them in connection with your duties with the bank? A. Yes.

Q. Could you tell us, please, how long the depository located at Plant City Plaza has been physically located there? A. The Plaza opened when—in October, wasn't it? It was—I believe it was October when the facility opened. It's been there since.

Q. October, 1965? A. 1966.

Q. 1966. Are your personally acquainted with any of the arrangements made for the location of that facility there? A. You mean arrangements with the lease holder?

Q. Yes. For example, do you know, of your personal knowledge, whether the property upon which the facility is located is owned by the bank or owned by other persons? A. Yes, I have that knowledge.

Q. Who does own the property upon which the facility is located? A. Hal Realty Investment, I believe is the—the people that own it, and this is leasing through an agent.

Q. Are they the people who own the shopping center per se? A. I believe so.

Q. And do you know whether the location in which the depository is fixed is leased from the owners of the real estate? A. Yes. It is on a lease basis.

Q. And does the First National Bank in Plant City lease the property directly from the owners of the real

estate, or do they lease it, or do they sublease, or do you know? A. I do not know.

Q. Do you know whether the First National Bank in Plant City pays rent for the space upon which the depository is located? A. Yes, we do.

Q. Do you know whether the tenancy of the bank at that location is at will, or on a month to month basis, or is it for a term of years? A. It is for a term of years.

Q. Do you know how long? A. No, I do not.

Q. Now, are you personally acquainted with the facility which is located at Plant City Plaza? A. Yes, I am.

Q. Would you, in your own words, describe it in terms of size and appearance? A. I would say that it was twenty feet deep. The walls are of a brick similar to that of our bank and about six feet from the rear wall is the receptacle and it is a glass enclosed—enclosure across abutting to the receptacle on either side.

Q. What is behind the receptacle? You mentioned, for example, the receptacle was about six feet from the rear wall. Is there a space behind the receptacle? A. Yes. There's about five or six feet there where people enter to open the receptacle.

Q. Is there anything else— A. The trap door is behind.

Q. Is there anything else physically located there other than an opening into the receptacle? A. We keep a few supplies behind there for the transmittal slips and envelopes and such.

Q. I'm not quite sure I understand your answer. You say you keep a few supplies for the transmittal slips. Do you mean you keep— A. We keep transmittal slips—

Q. —transmittal slips? A. —and envelopes.

Q. Transmittal slips and envelopes? A. Just as a place to keep them behind the receptacle.

Q. Who is responsible for placing those materials there? A. Our messenger who makes the trips out to the shopping center.

Q. I would like to show you what I believe to be a brochure published by the First National Bank in Plant City. On the front page it bears the title in large print "Bank Messenger Service" and on the first inside page is a drawing.

Does that drawing represent generally the facility which we have been discussing at Plant City Plaza? A. It does.

MR. SMITH: Will you mark this as Defendant Intervenor State Banks Exhibit 1 for identification.

(Whereupon, Defendant Intervenor State Banks Exhibit 1 was marked for identification.)

STATE BANKS EXHIBIT 1

AGAIN LEADING THE WAY

Bank Messenger Service

First

THE NATIONAL BANK

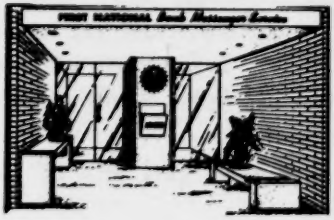
IN PLANT CITY . . . . . FLORIDA

DI State Banks
Ex. No. 1
for Identif.
2/7/67 J.H. Thayer

A Great New Service At First National

The handling of money is a bank's business.. the safeguarding of its customers' funds, is first responsibility. Bank Messenger Servic carries this responsibility right to the cu tomer's door.

Quite simply Bank Messenger Service act as the agent for our customers in transport ing sums of money to and from the bank a Haines Street... cash receipts from stores, payrolls, coin and currency order... check and other negotiable paper.



ARMORED CAR
MESSENGER SERVICE PROVIDES:

1. INSURANCE against theft or robbery during transmittal to and from the bank.
2. CONVENIENCE with pick-up and delivery service scheduled throughout Plant City and East Hillsborough County... six days a week, 10 hours a day.
3. SAFETY—Any danger of loss or robbery to and from the bank is completely eliminated.
4. TIME SAVING—No trips to the bank. Bank Messenger Service is as close as

your phone—24 hours a day, with recorded calls when the main bank is not open. You can phone a transmittal order at midnight for delivery the next morning.
(Phone 752-6166)

SHOPPING CENTER
MESSENGER SERVICE:

1. Commercial customers drop bags for transportation to bank by armored car.
2. Customers with personal accounts can place funds in receptacle for transmittal to bank, while shopping. It's better and safer than banking by mail.
3. All funds are insured against robbery immediately when dropped into receptacle.
4. Envelopes and transmittal slips are provided.
5. Service every day--seven days a week-during the hours the Plaza is open.

10TH ANNIVERSARY

Full Service Banking

PLUS Many Extras - Offered Only By First National

- SEPARATE DRIVE-IN BANK with five drive-in windows.
- MONTHLY INTEREST checks on Certificates of Savings.
- PERSONALIZED CHECKS—your name and address imprinted free.
- BANKING-BY-MAIL with postage paid by the bank, both ways.
- LOW COST LOANS—Personal loans, auto loans, home improvement loans.
- AND NOW-BANK MESSENGER SERVICE

THE First NATIONAL BANK
IN PLANT CITY.....FLORIDA

BY MR. SMITH:

Q. I also show you a single page exhibit upon which are clipped five photographs which are intended to represent the facility located at Plant City Plaza, which we are discussing. These were taken November 22nd, 1966.

Would you look at those five pictures attached and advise me whether, in your judgment, they correctly represent the location of the facility, the depository which we have been discussing? A. They do.

Q. And do they correctly represent the physical circumstances as they appear at that facility? A. Yes, sir.

MR. SMITH: Will you mark this Defendant Intervenor State Banks Exhibit 2 for identification?

(Whereupon, Defendant Intervenor State Banks Exhibit 2 was marked for identification.)

(Exhibit Not Reproduced)

BY MR. SMITH:

Q. Now, shown on Defendant's Exhibit 2 for identification is a sign reading "The First National Bank in Plant City, Florida, Bank Messenger Service." Do you know who caused that sign to be placed there and who paid for it? A. The First National Bank caused it to be placed there and the First National Bank paid for it.

Q. In the same pictures there appears to be on the right-hand side of the area in question a bench or piece of furniture with a palm sitting at one end and on the left-hand side a table or piece of furniture. Do I correctly describe the facility in that regard? A. Yes.

Q. What is the purpose of the table on the left-hand side of the picture? A. That's a container for the transmittal slips and envelopes for use in the depository or the receptacle.

Q. Do I correctly understand if persons wish to get envelopes and transmittal slips, they would get them at that site? A. That is correct.

Q. And is there also an area there where they could write and fill in the information required? A. Yes. That's a table top.

Q. Do you know who paid for the establishment of the bench and the table which we have just been discussing? A. The First National Bank in Plant City.

Q. Shown underneath the depository is a sign which is depicted in one of the five pictures, depicted in detail in one of the five pictures before you.

Who caused that sign to be placed underneath the depository? A. The First National Bank.

Q. Would you tell us, sir, what use is made of that depository insofar as the bank is concerned? A. The receptacle is for the use of our customers, not only in the shopping center, but for any others that would desire to use it. The merchants in the shopping center are provided keys for the receptacle and they place their night bags in the receptacle and basically that is it.

Q. Is it necessary to have a key to have access to the receptacle and put anything in it? A. Yes. It's only the night bags. Now, an envelope—there's an envelope slot that they could use without use of a key.

Q. You mentioned that the merchants in the shopping center are provided keys. Is this all tenants or merchants in the shopping center or those that have accounts with the First National Bank? A. Only those that desire to use the service and have accounts with the bank.

Q. What is the procedure for obtaining a key if one desires to use the service? A. Sign the contract with the bank and pick the key up.

Q. Now, you mentioned sign the contract with the bank. Can you designate any particular contract you have in mind? A. Yes. This is a joint—a dual-control contract which the merchant would sign with the bank.

Q. If a merchant requests an opportunity to obtain a key and use the depository, who delivers the contract to him? A. Normally the merchant would come into the

bank. However, it would—an officer of the bank would call on him, discuss the service with him and give him his key.

Q. Has that, in fact, occurred since the service was available? A. Yes, it has.

Q. That officers of the bank called on people? A. Yes.

Q. Now, did the officers of the bank call on only their then existing customers or did they call on other potential users of the facility? A. Both.

Q. Did they call on merchants only who occupied the Plaza or space in the Plaza or did they call on merchants within a certain area? A. Only those in the Plaza.

Q. This facility is located approximately one mile south of the center of Plant City, is this not true? A. That's correct.

Q. And is it within the city limits of Plant City? A. Yes, it is.

Q. Although I used to live here, I've forgotten some details. Where is the southern boundary of the city limits relative to this facility? A. I believe it's a quarter mile —about a quarter mile on south, isn't it?

Q. Now, when the merchants decide to use the facility and obtain the key and sign the contract that you have mentioned, do they thereafter, when they deposit their night bags or otherwise make deposits, execute any other document at the time they make each deposit? A. Yes. The merchant is provided with a transmittal form which sets forth the terms on its reverse side of the contract stating that the monies or checks are accepted for transmittal.

Q. I show you a document—

MR. SMITH: Which I will ask the Reporter to mark Defendant Intervenor Exhibit 3.

(Whereupon, Defendant Intervenor State Banks Exhibit 3 was marked for identification.)

STATE BANKS EXHIBIT 3

THE *First* NATIONAL BANK
IN PLANT CITY
PLANT CITY, FLORIDA 33566

MESSENGER TRANSMITTAL

_____
(Principal)

_____
(Address of Principal)

_____
(Date)

FIRST NATIONAL BANK, Plant City, Fla. as messenger and agent for Principal named above will transmit to the banking house the following, in accordance with the contract on the reverse side hereof:

PLEASE LIST CHECKS BELOW

ACCOUNT NUMBER	DOLLARS	CENTS
	D I State Banks	
	Ex. No. 3	
	for Identif.	
	2/7/67	
	J. W. Dreyer	

TOTAL DEPOSIT	COIN	CURRENCY	TOTAL CHECKS

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED

RECEIPT OF MESSENGER

Received locked bag stated to contain the total shown above ☐ INITIAL

The above total received and verified ☐ INITIAL

CONTRACT

First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

The bank maintains hazard insurance covering holdup, employee fidelity, etc. for the protection of the Principal for all amounts and items delivered to the bank's messenger by said Principal.

BY MR. SMITH:

Q. —and ask you, sir, is that the transmittal slip to which you've just referred? A. That's right. Yes, it is.

Q. I now hand you an envelope which is green in color and has written at the top of it The First National Bank in Plant City, 24-hour Bank Messenger Service and ask you if that envelope is used in connection with this depository that we have been discussing? A. Yes, it is.

Q. How is it used? A. The transmittal slip that the customer fills out along with the cash or checks that they are transmitting to the bank are placed in this envelope. This is for the use of those individuals who are making deposits, not necessarily the merchant.

Q. Well, customarily, does the merchant use this envelope? A. No, he does not.

Q. He does not. Customarily, the merchant uses only the contract to which you've referred which is executed initially? A. That is correct.

Q. And thereafter uses this deposit or messenger transmittal slip? A. Yes.

Q. Which he places in the bag with the currency and checks which he desires to deposit? A. Yes.

Q. Is this correct? A. That's correct.

Q. Now, if it is an individual who does not have a key to the depository, that individual would use the messenger transmittal slip to which we've just referred and the green envelope and put check or money in it, is this correct? A. That's correct.

MR. SMITH: Would you mark the envelope Defendant Intervenor Exhibit 4.

(Whereupon, the Defendant Intervenor State Banks Exhibit 4 was marked for identification.)

THE *First* NATIONAL BANK IN PLANT CITY

24-HOUR BANK MESSENGER SERVICE

USE THIS ENVELOPE ANY HOUR—DAY OR NIGHT FOR TRANSMITTAL OF CURRENCY, COIN OR CHECKS TO BANKS PREMISES BY BANK MESSENGER SERVICE.

AMOUNT OF CASH (NOT CHECKS) ENCLOSED
$_____.

(PRINT NAME, ADDRESS AND ACCOUNT NUMBER ON LINES BELOW)

DI State Banks
Ex. No. 4
for Ident.

ACCOUNT NUMBER 2/7/67 J. W. Dwyer

DIRECTIONS—EASY TO USE

1. FILL OUT MESSENGER TRANSMITTAL SLIP PROVIDED.
2. INDICATE ON THIS ENVELOPE THE TOTAL CASH TO BE TRANSMITTED.
3. PRINT YOUR NAME, ADDRESS AND ACCOUNT NUMBER FOR RETURN MAIL ON THIS ENVELOPE.
4. ENDORSE CHECKS. ENCLOSE CHECKS AND/OR CASH WITH TRANSMITTAL SLIP IN THIS ENVELOPE.
5. DROP THIS ENVELOPE ONLY IN THE RECEPTACLE PROVIDED AT THE BANK MESSENGER SERVICE PLANT CITY PLAZA.
6. THE FUNDS IN THIS ENVELOPE ARE ACCEPTED IN ACCORDANCE WITH THE CONTRACT PRINTED ON THE REVERSE OF THE MESSENGER TRANSMITTAL SLIP.

BY MR. SMITH:

Q. Mr. Futch, can any person desiring to use the facility make a deposit by using the green envelope and the transmittal slip? A. Yes.

MR. EDWARDS: I object to the question as phrased on the basis of deposit, Reece.

MR. SMITH: Well, I'll stipulate with you that I don't intend this witness to characterize the transaction in answering the question.

MR. EDWARDS: All right. Fine.

BY MR. SMITH:

Q. Would you like for me to repeat the question? A. If you would.

Q. Can any person make a deposit or place money and checks in the facility by using the green envelope and the transmittal slip? A. That is correct.

Q. Is it necessary for that person to have a then existing account at The First National Bank in Plant City? A. Yes, it is.

Q. Well, suppose I did not have an account at the bank. Could I, nevertheless, use the green envelope and the transmittal slip and put my money or my checks in the depository or in the receptacle and have them transmitted to the bank? A. You could, but you'd be immediately contacted and an account established.

Q. Has this ever occurred to your knowledge? A. Not to my knowledge.

Q. Are you able to determine from your experience what persons make use of this facility or where the persons live who make use of the facility? By that question I ask you not to name each individual, but to characterize the individuals who use it. A. Now, you're referring to the envelope service?

Q. Yes. A. There has been no pattern established to my knowledge.

Q. Do you know if The First National Bank in Plant City has solicited accounts from individuals distinguishing them from merchants located in the Plaza? A. Yes. I'm sure they have.

Q. With the representation or invitation to use the depository? A. Yes.

Q. This has occurred? A. We have. Yes.

Q. And do I correctly understand that in the solicitations for business which are made that they are not limited to existing customers of the bank? A. That is correct.

Q. Now, who makes such solicitations? A. The messenger would be one and, of course, any member of our officer staff or any employee of the bank.

Q. Has there been any program which you could describe in connection with solicitation? A. No, no program.

Q. Have the employees of the bank been instructed in any way to solicit use of the facility? A. No, they have not, only the officer staff. The employees of the bank have been kept aware of the service and how it operates.

Q. For the purpose of being able to describe to interested persons what it is? A. Not necessarily.

Q. Just for their general information, for the employees' general information? A. Yes.

Q. And have the officers undertaken to solicit business on the basis of availability of the facility? A. As I've stated, there's been no set program.

Q. I understand this— A. For solicitation.

Q. —but the officers have actually made such solicitation? A. Yes.

Q. Are you aware of any customers, either merchants located in the Plaza or individuals located elsewhere, who

have opened accounts at The First National Bank because of the availability of the depository? A. Actually, I know of none who have opened them for that purpose alone. Most of the merchants in the shopping center were new merchants in town and I'm sure that this probably weighed heavy in their decision to bank with our bank; but, for that purpose alone, no, I do not.

Q. Do you know of individuals as distinguished from merchants who have opened accounts with your bank because of availability of the service or would your answer be the same? A. None that I know of.

Q. What advertising, to your knowledge, has The First National Bank in Plant City done relative to the availability of this depository? A. The brochure that you presented a moment ago, radio and newspaper.

Q. Now, are you aware of any taxes which are paid by The First National Bank in connection with the depository? A. No, I am not.

Q. Who is responsible for the maintenance and cleaning of the depository? A. The bank's janitor is responsible for that.

Q. This is the janitor who serves at the main banking house? A. That is right.

Q. Located on Haines Street? A. That is correct.

Q. And he is directed and assigned the duty of going out and cleaning— A. Daily.

Q. —this facility also? A. That is correct.

Q. Is this done on any sort of routine basis? A. Every day.

Q. How is the money and checks received at the depository or receptacle at Plant City Plaza, which we've been discussing, how are these transmitted from that site to The First National Bank? A. By armored car, the bank's armored car.

Q. Did the bank institute an armored car service contemporaneously with opening the depository? A. That is correct.

Q. Would you describe for me the armored car service? First, describe the armored car physically. A. The armored car is a standard armored car manufactured by J. Tom Moore and Sons who are manufacturers of armored cars. It has a large bullet resistant glass on one side—in fact, all of the glass in the car is bullet resistant. Inside of the armored car is a roll top safe. This safe is equipped with what we call a dual-control combination or a locking combination. The roll top is a very simple device. You lay a bag or an item in it, pull the handle and the item drops inside the safe and then it cannot be removed until it is unlocked with the combination.

Q. Let me interrupt you there. Who has the combination to the safe or the ability to unlock it? A. That is assigned to three officers in the bank.

Q. Would you state who they are and what positions they hold? A. Bill Meriwether—I should say two officers and an employee of the bank. Bill Meriwether.

Q. Mr. Meriwether is a Teller, isn't he? A. He is a Teller. Myself and Leon Pelham. Mr. Pelham is Assistant Cashier.

Q. Is Mr. Meriwether one of the persons regularly assigned to the armored car? A. He is.

Q. And so there is a person aboard the armored car who has the ability and knowledge to open the safe should it have to be done? A. He has the combination. The key to that combination never leaves the inside of the bank only to go into the car to open it at the bank. We do not allow the key on the truck at any time.

Q. Is it necessary to have the key in order to get to the combination? A. Very definitely. It locks the combination. You cannot move the combination.

Q. Now, what other facilities are there aboard the car apart from the safe? A. It is air conditioned. We have a telephone in the car which allows him to report in occasionally. In the event that it is necessary for us to get in touch with him, we can reach him by this means.

Q. Is the telephone number a published number? A. I don't know. I don't think it is.

Q. It is a radio phone, I take it? A. It is a radio phone, yes.

Q. And who makes use of the telephone, what individuals? A. The Head Teller, Mr. Pelham, normally, and Bill Meriwether, the messenger.

Q. Are there any other facilities inside the armored car other than those you've described? A. None that I can think of.

Q. Are there any chairs? A. Yes, there is a chair.

Q. Are there locations for tellers I think would be the common term? A. There is a counter inside. In fact, the counter and then the shelf that lets down but this is never used.

Q. Are there facilities available for two tellers or one teller? A. I wouldn't say there is facilities available for any teller.

Q. Well, for two messengers then? A. No, this has never been used by the messenger.

Q. Is it designed so that two persons can serve at the same time? A. There are two drawers that open up outside, but, as I say, they're never used. This is—in fact, I don't see how they could be used.

Q. Now, you have described the armored car as a standard armored car.

Are there any differences in its design from those which one sees in the normal course of daily affairs? A. The window on the side and the tray—or the desk top, I suppose you would call it, that lets down.

Q. I show you the document which we've previously identified as Defendant Intervenor State Banks Exhibit 1 and call your attention to page 3 of the document where there is a picture of a motor vehicle. Is that drawing a proper representation of the armored car we've been discussing? A. It is.

Q. Now, is there direct communication from where the driver sits back to where the messenger is located or is that a— A. There is a barrier there; but there is a screen, a heavy wire screen between the two. They can communicate.

Q. And how many persons are normally, during the work week, assigned to this armored car? A. Two persons.

Q. And who are they? A. Bill Meriwether and Alton Goodwin, who is the driver and guard.

Q. Who employs those two persons? A. The First National Bank.

Q. Do you know, of your own knowledge, whether they receive the same compensation and benefits that employees receive who are located at the main banking house? A. They do.

Q. Does The First National Bank in Plant City have a pension plan for its employees? A. It does. It's called retirement.

Q. Does Mr. Goodwin and Mr. Meriwether participate in this pension or retirement plan? A. This plan goes into effect after the person has been with the bank for a specified period of time—

MR. EDWARDS: I don't think that this is pertinent. If you want to stick to fringe benefits, I think that's a fair question; but to delve into the operations of the bank, to me it's objectionable. I, therefore, object to this question and direct that you not answer until further clarification.

(Whereupon, a discussion followed off the record.)

MR. SMITH: While off the record, counsel for the plaintiff stipulated that Mr. Meriwether and Mr. Goodwin are treated similarly to other employees of the bank and participate in and enjoy the same fringe benefits that other employees do.

MR. EDWARDS: That's correct.

BY MR. SMITH:

Q. Do you know if The First National Bank in Plant City pays withholding tax relative to these two employees? A. Yes, they do.

Q. Do you know whether it pays Social Security in their behalf? A. Yes.

Q. They do—the bank does rather than— A. This is the same benefit as any other employee.

Q. And do you know if they are entitled to Workmen's Compensation benefits as employees of the bank are? A. Yes, they are.

Q. Returning to Defendants' Exhibit 1 for identification and calling your attention again to the drawing of the armored car, over the right rear wheel are shown two squares and a long triangle just below the glass window. Would you describe for the record what those squares and the triangle represent? A. The two squares represent the drawers which are hinged on the inside and let out at about a forty-five degree angle.

Q. What is the purpose of those drawers? A. I suppose to allow people to put items in them. We use them for storage on the truck.

Q. And what is the long rectangular— A. The long rectangular object is a counter which can be let down from the inside. This counter is constructed of a metal and can be let down or pulled back up from within the truck.

Q. What is the purpose of the counter? A. It would be —we don't use it, of course; but to allow a person to write on, I suppose.

Q. Do you know who gave to the Tom Moore Company the plans and specifications for this piece of equipment? A. No, I do not.

Q. Do you know whether this piece of equipment represents the standard armored car which that company normally manufactures and markets? A. I am not familiar with their specifications.

Q. Could you tell me whether it has ever been contemplated by The First National Bank in Plant City or is contemplated in the future that the bank will use the armored car for the purpose of dealing with the public and receiving monies and checks and other items from the public or delivering from the truck anything to the public? In short, are these drawers and counters there for a purpose which the bank once intended to put into effect or in the future intends to put into effect? A. There's never been any discussion for use of this type.

Q. So far as you know? A. As far as I know.

Q. Do you normally attend meetings of the Board of Directors of The First National Bank? A. Yes, I do.

Q. Do you know who owns the armored car; that is, holds title to it? A. The bank holds title to it.

Q. In what connection is the armored car presently used by The First National Bank? A. It picks up at the receptacle at the shopping center and it has established rounds that it makes to merchants in East Hillsborough County to pick up their transmittals or deliver change to them.

Q. Who establishes these rounds? A. The bank establishes them on the basis of need by the bank's customers.

Q. Does the truck operate on a fixed time schedule? A. Very close to a schedule.

Q. And who fixes that schedule or determines it in advance? A. The Head Teller.

Q. Of the bank? A. The Head Teller of the bank and the messenger.

Q. Now, is the schedule varied from at any time? A. It can be, yes.

Q. What would be an occasion or what is the customary occasion, if there is any for varying from the schedule? A. Perhaps another customer might call in and have the need for change immediately. They might vary a few minutes to drop his change off but this would be the only variation.

Q. And if the customer had that need for change, where would the customer call? A. He would call the bank.

Q. And how would the bank contact the armored car? A. If it was not at the bank at that time, we could contact him by radio phone.

Q. Does the customer have any direct contact with the car when it is not at the customer's location? A. No, he does not, only through the bank.

Q. Would it be fair to say that the armored car is completely subject to the directions of the bank insofar as where it goes and what it does? A. Yes it—

Q. Now, does anyone work on the armored car other than Mr. Meriwether and—what was the other man's name? A. Goodwin.

Q. Other than those two? A. Just on occasion. One day out of the week one of the other employees of the bank, either he's an officer—well, I think there's one or two other men that would work with Mr. Goodwin.

Q. And why do they work with Mr. Goodwin on those occasions rather than Mr. Meriwether? A. Because Mr. Goodwin is the guard and the driver.

Q. But why is Mr. Meriwether not present? Is it his day off? A. We give him a day off. We try to work our people on a five-day week and on a Saturday he would

normally—another one of the officers of the bank would take the run that day.

Q. Is it generally an officer who substitutes for— A. Most generally it is.

Q. —Mr. Meriwether? Most generally it is? A. As I say, there's only two other men in the bank—three, excuse me—three other men in the bank who are not officers who have knowledge of this operation.

Q. Well, now, do all of those persons actually work on the truck at times, both officers and these several other employees? A. I'd say once every two months.

Q. And do each of them have pistol permits from the Sheriff of Hillsborough County? A. No, they do not.

Q. Do the officers who work on the facility have pistol permits? A. They do not.

Q. Does Mr. Meriwether have a pistol permit? A. He has a special Deputy's—what would you call it? He is a special deputy of Hillsborough County, let's put it that way.

Q. And this is something which was achieved by The First National Bank in order to authorize him to— A. No, it was not.

Q. How did it come about? A. This was a personal thing with the Sheriff. He applied for it and received it.

Q. Did he apply for it—when did he apply for it? A. I can tell you the exact date in just a moment. October 7, 1966.

Q. Did he apply for it in contemplation of the armored car messenger service going into operation? A. Yes, he did.

Q. There was some publicity, Mr. Futch, in newspapers of this county, the Tampa Times, the exact date I don't have before me; an article written by Alice Thompkins,

Times Staff Writer, which is entitled "Bank Officers Seek Gun Permits" and it quotes you as saying that "guns will be carried by the armored truck personnel operating Plant City's First National Bank service and that the service was inaugurated yesterday and the gun permit action was initiated Wednesday when Futch appeared before the County Commission." Did that occur? A. I appeared at the County Commission with I think four of my officers and requested gun permits. The clerk did not have the forms. They were to be forwarded to us. We have never received them.

Upon arriving back to Plant City, I received a call from Alice Thompkins and she asked why the bank was wanting gun permits. I said we anticipated that one person on this truck should have a permit to carry a weapon; and out of this came the big bold headlines you see there and this is the only information she received.

May I go off the record?

MR. EDWARDS: No.

BY MR. SMITH:

Q. It was indicated that you were seeking a gun permit also. Have you obtained one? A. I received a special Deputy's Commission, I guess you would call it; but not through this source.

Q. Through the Sheriff's office? A. Through the Sheriff's office, yes.

Q. And this authorizes you as it does Mr. Meriwether— A. That is correct.

Q. —to carry a weapon? A. Yes, sir.

Q. What about Assistant Cashier Leonard Daniel, Randall Hinson and Leon Pelham? A. None of these gentlemen, to my knowledge, have a permit.

Q. Are they deputized? A. They are not.

Q. Are there any other employees or officers of the bank who are deputized? A. None to my knowledge ex-

cept Mr. Goodwin. He is deputized. He is the driver and guard.

Q. How long has Mr. Goodwin been an employee of The First National Bank? A. Since the latter part of '66. The exact date escapes me.

Q. Was he hired for the purpose of driving this armored car? A. Yes, he was.

Q. How long has Mr. Meriwether been an employee of the bank? A. Approximately a year and a half to two years.

Q. I take it then he was not initially hired to work as a messenger aboard the facility? A. No.

Q. What work did he do before he became the messenger? A. He was a Teller.

Q. And how long did he serve as a Teller in the bank before he began to work on the armored car? A. Approximately a year.

Q. Did either Mr. Meriwether or Mr. Goodwin receive any particular training preparatory to going on the armored car service? A. Mr. Goodwin has been a law enforcement officer in East Hillsborough County for a number of years, but no particular training was given him for this job. Of course, we've talked with him, cautioned him and counseled with him a number of times about their duties and so on.

Q. Did Mr. Meriwether receive any training in connection with his duties on the armored car other than that which was given to him by officers of The First National Bank in Plant City? A. Yes. He has been schooled in his duties as the messenger. We've made him aware of the contracts under which he operates and his relationship with the customer of the bank.

Q. Was this done by communications between Mr. Meriwether and officers of the bank? A. That is correct.

Q. Well, outside of the bank, has Mr. Meriwether received any training? A. No.

Q. Was he sent to any schools? A. No, he was not.

Q. Was he given any training in the use of firearms? A. No, he was not. May I say that Mr. Meriwether does have a permit, but he does not carry a weapon.

Q. That was to be my next question, whether, in fact, he did carry a weapon. A. No.

Q. Then the only person armed is Mr. Goodwin? A. Is Mr. Goodwin.

Q. Now, how is the armored car service used by The First National Bank? What services does it render or what services are rendered by its use. A. It delivers change to the merchant on order. It picks up his receipts for transmittal to the bank on a scheduled basis. This may be six days a week or it may be one or two days a week. It depends on the individual's use.

Q. When the merchant requests or when the individual requests and receives change, what does he give the messenger in return for the change? A. When we receive the order for the change, we immediately charge—before delivering it, we charge the man's account, the merchant's account, for the change so we're delivering his money to him in effect.

Whenever we deliver it to him, he signs a receipt for it stating he has received X number of dollars.

Q. Is the money in this fashion ever delivered to him in exchange for a check? A. No, it is not.

Q. Or other negotiable instrument? A. It is not.

Q. Are there any occasions, to your knowledge, where persons not having accounts within The First National obtain monies by calling the bank and asking for delivery and either making— A. No.

Q. —arrangements for credit at the bank or else deliver checks? A. Not to my knowledge.

Q. Do you know if payrolls are delivered by the messenger car? A. It could be—if this is a customer of the bank and we charge their account for it, we treat it just as a change order, so it could be a payroll, certainly.

Q. Now, when the customer telephones the bank and indicates that he wants change or wants a payroll, what are the mechanics which the bank goes through before placing the money in the hands of the messenger? A. We put the change order together, type up a charge to the man's account, make up the receipt, attach it to the bag. The bag is sealed and the receipt is attached to the outside of the bag and then it goes into the messenger's hands for delivery to the customer.

Q. Is this—is there any sort of document or piece of paper which ultimately is delivered to the customer showing his account has been debited? A. Yes. He receives this in his monthly statement showing his account has been charged with X number of dollars that day. Of course, he receives a copy of the charge immediately.

Q. When the money goes out? A. When the money goes out there.

Q. Is there any charge made for the service? A. No charge.

Q. What areas are presently served by the armored car? A. We cover the Plant City area. We go as far as the county line—I'd say a mile beyond the county line on 92 toward Lakeland and as far west as Mango.

Q. And the armored car then goes into Polk County, Florida, in the direction of Lakeland? A. Yes.

Q. What about south? How far south does it go? A. State Road 60, I believe, is their limits at this time.

Q. Do you know where Pleasant Grove is located? A. Yes. That's across 60. It would be south of Turkey Creek. Am I correct?

MR. EDWARDS: Yes.

BY MR. SMITH:

Q. Does the armored car serve customers on Pleasant Road? A. Yes.

Q. Does the armored car go into the Turkey Creek area? A. Yes. It goes through the Turkey Creek area to get to Pleasant Road, I think.

Q. And does it serve customers in the Turkey Creek area? A. Yes, on 60 at Turkey Creek.

Q. Does it do any business with the Turkey Creek High School or the school system at Turkey Creek? A. I do not believe so. Not to my knowledge. At this point I don't think it does.

Q. If the armored car service was calling upon the school complex located at Turkey Creek, do you know for what purpose it would be stopping there, and either receiving or delivering monies? A. No, I don't.

Q. Is there any variation ever made where the armored car service delivers monies to or obtains monies from persons other than customers of the bank? A. No. They must be a customer of the bank and they must be on a contract.

Q. And you have no knowledge of any variation ever having been made from that? A. No.

Q. Are there any plans to your knowledge or any limitations which have been placed upon the area which will be served by the armored car? A. In our discussions we've determined that our trade area would be the only area that we would serve.

Q. Should you have the occasion to do it, there's nothing which would necessarily limit you from going further west than Mango? A. No.

Q. Nor further south than Pleasant Grove or Highway 60? A. I couldn't see anything that would keep us from it.

Q. Nor further east than the point at which you presently go beyond the county line? A. We have actually declined a client because we felt it was outside our trade area.

Q. Where was that one located? A. This was in Mulberry.

Q. What uses are made of the armored car service, other than those which you have described? A. Well, we delivered some strawberries in it the other day. I can't think of any other uses that have been made of the car.

Q. Is it used to deliver the bank's cash letters to any other banks? A. Very possibly it might be.

Q. For the record, would you state what the delivery of cash letters means? A. Daily the two banks in Plant City, the Hillsboro State Bank and The First National Bank make an exchange of the checks which have accumulated drawn on the other bank and make a cash settlement of the difference. These checks are called clearings and it is very possible that this has been done. To specifically state yes, it has, or, no, it has not, no, I could not.

Q. Do you know if the armored car has been used to deliver cash letters to any banks other than the Hillsboro? A. Not to my knowledge, no.

Q. Is it possible that it might have been done? A. It is very unlikely.

Q. Is the armored car used in any way for advertising purposes? A. I don't know what you would call advertising. We use its picture in publications such as you have presented here.

Q. Is it moved about from location to location where groups or crowds are gathered for the purpose of display? A. Oh, it might be. I can think of one occasion when the shopping center opened that it was driven through the shopping center.

Q. Are any instructions placed by the bank on the use of the car after banking hours? A. I don't know of any occasion when it would be used after hours.

Q. Some of the advertisement refers to a 24-hour messenger service. What is meant by that? A. That is the receptacle at the shopping center and also into this, we have a recording device in the bank where the merchant might call in after hours and leave his change order and this is what we refer to as 24-hour messenger service.

Q. But the actual delivery of that change wouldn't be made until the next day? A. That is correct.

Q. During banking hours? A. That is correct.

Q. Can you think of any other occasions where the armored car might be located for advertising purposes other than the opening of the Plant City Plaza? A. No, I can't.

Q. What about at football games in Plant City? A. I don't attend football games. Now, if it was there, it was there without my knowledge. I have no knowledge of it.

Q. You have no knowledge of any policy for sending it to gatherings of that sort? A. No.

Q. Would it be within the banks policy for those having access to it to use it simply to ride to the football game? A. They'd have to receive permission from the President of the bank to do so.

Q. Are you aware of any such permission having been given? A. No, sir, I'm not.

Q. Can you state the volume of business which is performed by use of the armored car service on a weekly basis? A. This would be a very difficult thing to do in that it would fluctuate, of course, from week to week. The figures—I don't have at my fingertips.

Q. Could you state whether the volume of business has increased since the service was first offered in October of last year? A. I couldn't state that it has, no.

Q. Do you know any person in The First National Bank's organization who would be able to state the volume of business? A. Yes. There are records kept of these things.

Q. What kind of records are kept? A. The messenger makes the daily report to the President and myself of his activities, the total of the deposits or transmittals he's picked up and change delivered, etc.

Q. Having received these reports on a daily basis, you cannot give any average monthly volume or weekly volume of business? A. I'd have to review before I could give you a definite figure on it.

Q. Do you know of any instances where persons who before the service was inaugurated were customers of the Hillsboro State Bank have now opened their accounts or split accounts between the Hillsboro and The First National in order to make use of either the depository or the armored car? A. The only one that I could think of would be the little store at Pleasant Grove. I don't know if this is what caused the change or not, or if it's a split account or not. I don't have that knowledge, but they were a customer of the Hillsboro Bank.

Q. Is there a printed schedule of the itinerary of the armored car? A. No, there is not.

Q. Could you tell me whether the armored car messenger service is advertised as a part of the over-all serv-

ices offered to the community by The First National Bank in Plant City? A. I would say it is, yes.

Q. Would the armored car service, as presently operated, receive from merchants or other individuals deposits to be delivered to another bank other than The First National? Don't—I mean no word of art—I don't use deposits as a word of art, but receive monies to be delivered to another bank. A. No, they do not.

Q. Do you know whether it is a stated policy of the Board whether—the Board of Directors of The First National whether or not it is, in fact, followed that there has to be an officer aboard the truck at all times, the armored car? A. I don't know of any such policy.

Q. Is the armored car service used in any way to service the Lykes Brothers plant located at the airport in Plant City?

MR. EDWARDS: At this point, Mr. Smith, I'm going to object to the questioning concerning specific customers of our bank and direct him that he not answer it, because I don't see where this touches upon the issues of the point in question.

I do not feel that the exploratory as to a list of our customers, who they are and what our banking relations are with them has any point in the present litigation and, therefore, I object to the question as stated.

MR. SMITH: Let the record reflect that we think it is pertinent to a showing of competitive equality and a showing of jurisdiction in the cause.

I take it you still direct him not to answer?

MR. EDWARDS: Yes, sir, I do.

BY MR. SMITH:

Q. Does The First National Bank maintain any kind of insurance or fidelity bonds which pertain either to the

operation of the depository or the armored car? A. Yes. It is completely covered by our bond and insurance.

Q. Would you explain to me the nature of the coverage? A. It is a standard blanket form 24 with a million dollar excess and we have fidelity coverage—it's the same—actually, we have an endorsement which gives us the same coverage as our bank.

Q. Then you have an endorsement which would, in effect, protect against dishonest operations, embezzlements or thefts? A. That is true.

Q. By the persons on the armored car? A. That is correct.

Q. Of the funds they are handling? Is this correct? A. That is correct.

Q. And in addition to this you have insurance on the items which are being transmitted by the armored car as to loss, theft, destruction and so forth? A. That is correct.

Q. And who pays the premiums on this insurance? A. The First National Bank.

Q. What instructions, if any, are given to officers of the bank who are soliciting accounts in connection with or who are offering the armored car and the depository service to customers? A. The officers of the bank are made aware and have been made aware of the contents and intent of the contract which the customer must enter into and the relationship of the customer with the bank and that is that of a messenger.

Q. Well, you say the officers are made aware of this. Do they have any other instructions? A. The officers and any other person calling on a customer.

Q. All right. They are made aware of this? A. Yes.

Q. Is this the extent of their instruction in connection with it? A. Yes, it is.

Q. I ask you whether or not any charge was made by the bank to the persons who make use of either the depository or the service. You stated that no such charge is made. A. We do not charge at this point.

Q. Has any charge ever been made? A. Not to my knowledge.

Q. Are any payments on loans received by the messenger on the armored car? A. The messenger wouldn't receive a loan payment. If it were included in the bag and we didn't know about it, I don't know if this has happened or not—

Q. Is it available through the service? A. It is not offered through the service.

Q. And you have no knowledge one way or the other whether it has, in fact, happened? A. No, I do not.

Q. You mentioned that persons relieved Mr. Meriwether on Saturdays. A. Yes.

Q. What does the armored car do on Saturdays? A. It makes its normal run. It picks up the bags from the receptacle at the shopping center and then if there is any change to be delivered, it will deliver that; and then it makes its run, pick up deposits—transmittals I should say, and usually it would be through within two or three hours time; and, incidentally, I stated before that there were three people who have this combination. I stand corrected on that. I believe there are more now that I think about it. The combination was made available to those men working on Saturday.

Q. You're talking about the combination to the safe? A. The combination to the safe inside the truck.

Q. Now, is the First National's main banking house located on Haines Street open on Saturdays? A. It is not.

Q. Where does the messenger service obtain monies on Saturday to deliver to customers through the messenger car? A. We have one teller's cash drawer that is left available to the gentleman working there on the car in a vault that they can get to; and if there is any change orders to be made up, it is made up from that, from that cash box.

Q. Can the bank and does the bank actually receive on Saturday requests for change or monies or are the requests received on Fridays and delivered on Saturdays? A. Most of them would be received on Fridays. However, if there is a message on the recording device when they go in Saturday mornings, this is the one they would fill.

Q. Is it part of the program that a customer could call in on a Saturday and if the armored car hadn't made its rounds or run, he could then place his order and— A. He could conceivably. That is correct.

Q. And what is done with the money and other items which the bank receives, which the armored car receives on Saturdays? A. They are removed from the car, placed in the vault.

Q. Well, is there any accounting work or— A. Not on Saturday.

Q. —other work done on Saturday? A. No.

Q. Just the envelopes and bags are physically taken from the car and placed in the vault for handling on Monday? Is this correct? A. That's correct.

Q. Would it be fair to say that the armored car—by virtue of the armored car service, the First National makes money available to customers on Saturday and picks up money from them, money and other items? A. Yes.

Q. When a customer calls on Saturday or when he's placed on the recording on a Friday and it is picked up and acknowledged on Saturday and money is delivered on Saturday to the customer, how is his account debited on that day? A. The charge is made up when it is taken off the recorder. It is made up and they follow the same procedure; and the charge to the man's account, of course, wouldn't go through until Monday.

Q. The Teller makes up the charge or Mr. Meriwether makes up the charge or whoever it is makes up the charge on that day? A. Yes.

Q. But his account is not debited until the bookkeeping machinery is gone through the following Monday? A. If he made it up on Friday evening, it still wouldn't go through until Monday because of the banking hours.

Q. My question is: The actual mechanics of debiting the account are not effected until Monday? A. That is correct.

Q. Just one other question and I believe I'm through, Mr. Futch.

Referring again to Defendants' Exhibit 2, calling your attention to the picture in the upper right-hand corner. Would you tell us again what it is that is behind these doors which is shown in the picture? A. That's a wall—a wooden wall.

Q. Is there a door on both sides of the receptacle or only on the left-hand side? A. Only on the left-hand side.

Q. And is this solid glass on the right-hand side? A. Yes.

Q. Is the door on the left-hand side kept locked? A. It is kept locked.

Q. Who has the key? A. The messenger and myself.

Q. Does the janitor also? A. Yes.

Q. And back behind that door do I correctly understand that the only thing which is kept there are extra

materials for use in the front of the vault? A. Oh, there is a telephone back there, too. I failed to mention that.

Q. How is that phone listed? A. First National Bank Messenger Service. Wait a minute. It's not listed, I don't believe. I think it is unlisted.

Q. Who pays for it? A. First National Bank.

Q. And what is its purpose? A. For the use of the messenger when he goes out to remove the contents of the receptacle. If there is any problem or anything, it gives him something to call on.

Q. Is there any particular reason why officers are used to replace Mr. Meriwether on Saturday? A. Yes, to spread the work load around really. This would be the only reason for it.

Q. Does it have anything to do with the necessity of complying with wage and hour law regulations? A. No. No. We like to give all of our people a five-day week and this is the best way we felt of doing this.

Q. Do you know if in the event you didn't give your people a five-day week whether paying them on Saturday would increase the payroll or in any way change the structure of your employee payments for wage and hour or other purposes? A. Well, we would make some arrangement whereby our people would work a five-day week even if we had to hire someone else. This is what we would do.

Q. Are the officers who—do the officers who take over on Saturday receive additional compensation? A. Most of our officers are on a straight salary.

Q. So they perform this periodic Saturday work for the salary which they earn, is that correct? A. Yes, most of them—you'll find half of them work on Saturday anyhow, either in one capacity or another. It's a part of their job.

MR. SMITH: All right. Thank you. I don't have any other questions.

MR. EDWARDS: Charles, you have a right to read this and sign the deposition or you have a right to waive the signing. I think you can waive it.

THE WITNESS: I'll waive it.

MR. EDWARDS: You waive it?

THE WITNESS: Yes.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

The witness, CHARLES FUTCH, waived the reading and signing of his deposition after his rights under the Rules were explained to him.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

INTERVENOR-PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF—FILED FEBRUARY 20, 1967

Intervenor-plaintiff, by his attorneys brings this action against the above-captioned defendant and complains as follows:

COUNT I

JURISDICTION AND VENUE

1. This is a civil action for a declaratory judgment and injunctive relief. It arises under 12 U.S.C. Sections 1 and 36. This Court's jurisdiction is based on 28 U.S.C. Sections 1331, 1345 and 2201. The amount in controversy exceeds, exclusive of interest and costs, ten thousand dollars ($10,000). Venue is based on 28 U.S.C. Section 1391(b).

PARTIES

2. Intervenor-plaintiff is the Comptroller of the Currency of the United States and is charged by law with administrative and regulatory authority over National Banks.

3. Defendant is the Comptroller of the State of Florida and, ex-officio, the State Commissioner of Banking and as such is an official of the executive branch of the Government of the State of Florida. He maintains his residence and offices in Tallahassee, Leon County, Florida.

4. Pursuant to his statutory duty to regulate and supervise the activities of national banks the Comptroller of the Currency has issued the following ruling with respect to messenger services provided by national banks:

> 7490. Messenger service
>
> To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid

at the bank when the money is handed to the messenger as agent for the customer.

5. By letter dated August 31, 1965, the Comptroller's Regional Counsel for the Sixth National Bank Region advised the First National Bank in Plant City, Plant City, Florida of the Comptroller's ruling that a national bank may provide messenger service by means of an armored car or otherwise to pick up from customers monies to be delivered to the bank for deposit pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank.

6. By letter dated June 29, 1966, the Regional Counsel for the Sixth National Bank Region advised the First National Bank in Plant City that it could, as an incident to its banking business, construct a receptacle away from its premises for receipt of night bags containing cash and checks, the receptacle to contain thereon a notice clearly stating that the messenger who recovered the night bags acted solely as the agent for the customer and that the funds would not be deemed deposited until delivered to a teller on the bank premises.

7. First National Bank in Plant City is now providing an armored car messenger service and off-premises receptacle for its customers pursuant to agency agreements entered into on the basis of the rulings of the Comptroller of the Currency.

8. On September 20, 1966 First National Bank in Plant City received a letter dated September 28, 1966 from J. D. Chapman, Deputy Comptroller of Banking of the State of Florida stating that First National's operation of an off-premises receptacle and armored car messenger service constituted a violation of Section 659.06(1)(a) Florida Statutes and requesting First National to cease and desist therefrom or face legal proceedings instituted by the State Comptroller to curtail the said operations.

9. Pursuant to the National Bank Act, 12 U.S.C. 1 *et seq.* national banks are creatures and instrumentalities of the United States subject to the paramount authority of Congress to legislate with respect to their operations and subject to examination, regulation and supervision solely by the Comptroller of the Currency of the United States.

10. Defendant has no authority to define the rights, privileges, powers, immunities of national banks or to supervise or regulate the business of banking as conducted by such banks. Defendant has no authority to issue cease and desist orders to national banks seeking to curtail their exercise of powers, rights, privileges and immunities under Federal law.

11. Defendant's effort to restrict or prohibit a National Bank from maintaining a non-depository receptacle off premises and an armored car messenger service as agent for its customers pursuant to Federal law and regulation is in derogation and contravention of the paramount Federal law and regulation and is therefore null and void.

12. Intervenor-plaintiff alleges on information and belief that defendant will seek by legal or administrative action or otherwise to restrain First National Bank in Plant City from lawfully carrying on the business of banking by maintaining a receptacle off premises and by operating an armored car messenger service as agent for its customers.

13. The unlawful interference by defendant with the activities of a National Bank, especially if confirmed by this Court, will cause great and irreparable damage to the administration of the national banking system in this country and to the operations of the Office of the Comptroller of the Currency of the United States.

WHEREFORE intervenor-plaintiff prays:

1. For a judgment declaring that state officials are without authority to regulate and supervise national banks or

otherwise interfere with the regulatory and supervisory functions invested by Congress in the Comptroller of the Currency.

2. For a decree enjoining defendant from interfering or attempting to interfere with the operations of any National Bank in maintaining a non-depository receptacle off premises and an armored car messenger service as agent for its customers pursuant to Federal law and regulation.

COUNT II

1. For further and additional relief intervenor-plaintiff re-alleges all of the allegations contained in Paragraphs 1 through 13 in Count I in his complaint in their entirety.

2. The establishment of National Bank branches is governed by 12 U.S.C. 36 and the sole definition of what constitutes such branches is found therein. 12 U.S.C. 36(f) provides as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

3. Neither the armored car messenger service nor the off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City is a branch within the meaning of 12 U.S.C. 36 or in contravention of Section 659.06(1)(a) Florida Statutes.

WHEREFORE intervenor-plaintiff prays:

1. That as further and additional relief in this proceeding, this Court enter its judgment declaring that the armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now

operated by the First National Bank in Plant City do not constitute a branch within the meaning of 12 U.S.C. 36 or in contravention of Florida law.

2. That the Court grant intervenor-plaintiff such other relief as may be just and proper.

Respectfully submitted,

/s/ Barefoot Sanders
Assistant Attorney General

/s/ Clinton N. Ashmore
United States Attorney

/s/ Harland F. Leathers
/s/ Lester A. Jensen
Attorneys, Department of Justice

Attorneys for Intervenor-Plaintiff, William B. Camp, Comptroller of the Currency of the United States

Of Counsel:

/s/ Robert Bloom
Chief Counsel

/s/ Richard S. Beatty
Associate Chief Counsel

Office of the Comptroller of the Currency

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

MOTION FOR LEAVE TO INTERVENE AS PARTY PLAINTIFF—FILED FEBRUARY 20, 1967

William B. Camp, Comptroller of the Currency of the United States by his undersigned attorneys, moves the Court, pursuant to Rules 24(a) and (b) of the Federal

Rules of Civil Procedure, for an order permitting him to intervene in the above-captioned civil action as a party plaintiff, so as to file therein the annexed complaint and to participate in further proceedings in this matter.

This motion is based on the following grounds:

1. Applicant is the Administrator of the National Banking System of the United States and is charged with and given the power and jurisdiction to enforce all laws relating to national banks and national banking throughout the United States;

2. That the subject matter in the complaint for declaratory judgment and injunctive relief herein concerns the interpretation of the National Bank Act, 12 U.S.C. 1 et seq., and the activities of National Banks conducted under the authority and supervision of the Comptroller of the Currency;

3. That the interest and duty of the applicant in administering the national banking laws and supervising the National Banks of this country may, as a practical matter, be impaired or impeded by the disposition of this action;

4. That the applicant's claim and the main action have questions of law and fact in common;

5. That the plaintiff herein relies upon statutes administered by the Comptroller of the Currency of the United States and upon regulations made pursuant thereto;

6. That the representation of the applicant's interest may be inadequately represented by existing parties.

In support of this motion the Court's attention is respectfully directed to the Memorandum of Points and Authorities and the Affidavit of William B. Camp dated

February 15, 1967, attached hereto and made a part hereof. Also attached is the Complaint of the applicant for intervention as required by Rule 24(c), Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ Barefoot Sanders
Assistant Attorney General

/s/ Clinton N. Ashmore
United States Attorney

/s/ Harland F. Leathers
/s/ Lester A. Jensen
Attorneys, Department of Justice

Attorneys for Intervenor-Plaintiff, William B. Camp, Comptroller of the Currency of the United States

Of Counsel:

/s/ Robert Bloom
Chief Counsel

/s/ Richard S. Beatty
Associate Chief Counsel

Office of the Comptroller
of the Currency

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT—FILED FEBRUARY 20, 1967

DISTRICT OF COLUMBIA, ss:

William B. Camp being duly sworn, deposes, and says under oath that:

1. I am Comptroller of the Currency duly appointed by the President of the United States, and, as Comptroller of the Currency, I have responsibility for the administration of the National Bank Act, Title 12 U.S.C., Section 1 et seq., and for supervision and regulation of the approximately 4,800 national banks now operating pursuant thereto.

2. I have been advised that the Deputy Comptroller of Banking for the State of Florida has advised the First National Bank in Plant City, Florida that its operation of an armored car messenger service and off-premises receptacle pursuant to the rulings and approval of this Office, is unlawful. I am further advised that the First National Bank in Plant City has filed suit in the United States District Court for the Northern District of Florida seeking a declaratory judgment that its operations challenged by the State Comptroller are lawful and seeking to enjoin the State Comptroller from interfering in the operations of the bank. I make this affidavit for use in support of my application to intervene as a party plaintiff in that action.

3. Since at least 1929 the Office of the Comptroller of the Currency has regularly approved the operation of messenger services similar to those offered by First National Bank in Plant City. The current ruling of this Office with respect to such activity is published at paragraph 7490 of the *Comptroller's Manual for National Banks.* A copy of that ruling is annexed hereto.

4. In reliance upon the rulings and interpretations of this Office, National Banks in at least eleven states have offered messenger service identical or similar to that now provided by First National Bank in Plant City.

5. The operation of messenger pickup and receptacle services represents a useful and potentially important as-

pect of the regular operations of National Banks. This is a practice which has continued over a long period of time and, in my judgment, is of considerable benefit to the banking public as well as to the banks themselves.

6. My ability to administer the National Bank Act and to regulate and supervise the approximately 4,800 National Banks in this country would be impaired by interference in the affairs of these banks by persons without authority or responsibility to regulate National Banks.

7. A decision in the pending litigation instituted by the First National Bank in Plant City with respect to the lawfulness of the activities of that bank challenged by the State Comptroller would have a direct and material effect upon the administration by this Office of the National Bank Act and my regulation of the National Banks of this country.

/s/ William B. Camp
Comptroller of the Currency
of the United States

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF WILLIAM A. DANCE —FILED MARCH 7, 1967

• • •

Q. (BY MR. EDWARDS) Does the Peoples Bank of Lakeland have customers that use an armored car service regularly? A. Yes.

Q. Could you estimate the number of such customers? A. Not in number, but it's substantial.

Q. Does the Peoples Bank of Lakeland arrange for this service for any of its customers? A. The customer does the arranging.

Q. Does the Peoples Bank of Lakeland pay for this service for any customer? A. No, sir.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF FRANK H. MOODY —FILED MARCH 7, 1967

• • •

Deposition of FRANK H. MOODY, taken pursuant to notice this 20th day of February, A. D., 1967, before Miriam Strickland, Court Reporter and Notary Public in and for the State of Florida at Large, at 107 S. Evers Street, Plant City, Hillsborough County, Florida, beginning at the hour of 11:10 A. M.

Thereupon the said

FRANK H. MOODY,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Direct Examination by Mr. Edwards

Q. State your full name, please, sir? A. Frank H. Moody.

Q. And what is your position with the Hillsboro Bank? A. President of the Hillsboro Bank.

Q. The Hillsboro Bank is one of the intervening plaintiffs, defendants I should say, in the proceedings of the

First National Bank versus Fred O. Dickinson, Jr., and were you one of the officers, or the officer who made the decision to, on behalf of the bank, to intervene? A. One, I was one of the officers involved in making the decision. The decision was made by the Board of Directors.

Q. And as such officer you have knowledge of all of the facts affecting adversely, or otherwise, the Hillsboro Bank resulting from the operation of the First National Bank?

MR. SMITH: Wait a minute. I object to the question. It's improper to ask a witness does he have knowledge of all of the facts that may have bearing on a lawsuit. He doesn't know whether he has knowledge of all of the facts. That involves legal decisions as well.

Q. Striking the word "all", Mr. Moody, do you have knowledge of these facts which you considered adversely affected the Hillsboro Bank? A. Yes, I have knowledge of facts that we consider would adversely affect.

Q. As Executive Officer of the bank is there any other person that would have more knowledge of the facts affecting this than you, any other person in the bank? A. Not to my knowledge.

Q. Now, would you state for the record the adverse effects which the Hillsboro Bank has experienced to the date of the taking of this deposition as a result of the operations carried on by the First National complained of in this proceeding, that is the establishment of the money receptacles from Plant City, Florida, and the operation of the armored car service? A. Well, in the establishment of the money receptacle, Grant's made the decision to go to our competitor, based on the fact that they had a closer service available. Colony Shops, when contacted by our representative, stated that they made their selection because the money receptacle was convenient to them. McCrory Stores made their decision based on the same facts.

There are others that we think were influenced because of the location of the money receptacle.

Now, as far as the armored car operation goes, this has a corrosive effect that can work like a canker. New business coming to town offered this service, where we are prohibited from offering a similar service, prohibited by the Comptroller of the State of Florida by letter, where he described this as branch banking, by the very fact that Mr. Rickert has stated to the news media, and under oath, that they are handling a million dollars a week, twenty weeks, twenty millions of dollars, since we are the largest and oldest financial institution here, it's reasonable to assume that part of this would have come to us had the truck not been used.

Specifically, Mrs. Brumeyer down at Sydney has started using the truck service rather than continuing doing the business that she was doing with us, based on credit extended to her, and other services rendered to her by the Hillsboro.

Further, I think it's inferred we have spent some $750,000.00 in new building. The growth has not been what we had anticipated, and we think that this in part is reflected by the armored car service.

Q. Now, you have testified, or referred to previous testimony concerning the fact that the First National is handling approximately one million dollars a week with its armored car service. To your knowledge have you, with the exception of Mrs. Brumeyer, who you just testified to, do you know of any customer of the Hillsboro Bank that has left the Hillsboro Bank or ceased to do business with them as a result of the services offered by the First National? A. Mr. Edwards, I don't know that I could name by name the customers.

Q. Mr. Moody, let me qualify this. I'm not going to ask you to identify your customers in any question that I ask you. I would like for you to talk in generalities

about customers. You don't have to give me names nor addresses because we're not here seeking that information, but do you have knowledge concerning customers? A. I couldn't name a customer in generalities.

Q. In other words, is your answer that you know of no customers, other than Mrs. Brumeyer, is that a fair response? A. Yes, I think so.

Q. Now, you stated that you have recently moved into a new building which was constructed. Could you tell me what growth that was anticipated, and how this has fallen short of the expectations? A. Well, we judged our growth by the usual growth that accompanies a new building. We anticipated that our growth would be some, well, three to four million dollars a year based on this. Our growth in deposits since we opened up in September when this truck was started, when the drop was established down here, has only been about two hundred thousand dollars, which is quite a distance from even two million dollars.

Q. Now, during the year 1965, what was your deposit growth? Give me your total asset growth, since I have asked that of the others, could you in round figures or approximations, if you could? A. In 19—what is your question?

Q. '65, your total asset growth or deposit growth, whichever you prefer to give me, whichever is available. A. Total resources, 1964, December 31st were $21,400,000.00. 1965, $22,493,000.00. In 1966, when we increased the rate that we are paying, or certificates and on savings, it had grown to $26,095,000.00.

Q. Now, are you able to pinpoint with any particularity areas that have actually impeded your growth as a result of these activities complained of against the First National?

MR. SMITH: I don't understand the question.

MR. EDWARDS: Read it back and let's see if I do.

(Thereupon the Court Reporter read the pending question.)

Q. Do you understand the question, Mr. Moody? A. No, I don't. Would you rephrase it?

Q. Since the beginning of the activities complained of, can you testify as to how you have been adversely affected by the operations? Now, I'm aware that you mentioned the fact that Grant's, Colony Shops and McCrory's in the shopping center indicated that they went to the First National, and I guess we should make an exception of those. Could you testify as to any other adverse effect?

MR. SMITH: That's what he's been doing for the last five minutes, isn't it? Is your question different from that which you have already asked about? He mentioned specific customers relative to the depository, or receptacle as you call it in Plant City Plaza. He mentioned the armored car effect, he mentioned the growth of the Hillsboro after its new building.

MR. EDWARDS: Well, I think I was asking for other examples, or what I had hoped I was asking for, other examples.
I concede the point.

MR. SMITH: Anything in addition to what he has already testified?

MR. EDWARDS: Yes.

A. I would like to say this, Mr. Edwards, that a recent car showing that we have held down there, we were invited down there by the car dealers and by, we are associate members of the organization, and we were there to discuss financing with possible customers of the automobile dealers. Well, Joe Donnoly went to Fred Sher, who

is the President of the organization of the merchants down there, and complained about our being there.

Q. Could you tell me who Joe Donnoly is? A. Joe Donnoly apparently represents the owners of the property. He apparently is in charge of renting the stores down there. You possibly know more about Joe Donnoly than I do.

Q. No, I don't. A. To my knowledge I have never met him, but Joe made this statement, he said that the First National had paid for the right to be out there and had a right to say whether we should be there, this sort of inference. We took down our table and we, at the suggestion of Mr. Sher, we left our advertising material with the automobile dealers, and since it was suggested that we shouldn't be there with any evidence that we represented the Hillsboro Bank, while we thought it best for the sake of everyone involved not to be there. So, we left. Now, here we find ourselves involved in a lawsuit. This is completely foreign to our nature. It is bringing adverse criticism to us.

The entire operation, we're advised that it's against the branch banking law, and we find ourselves drawn into a situation that we did not start.

Q. All right. If I could interrupt you here. Joe Donnoly, you quoted Joe Donnoly as making a statement to the chairman of the merchants' association or something out there. Do you have any knowledge of whether or not the First National suggested such a thing as this? A. Yes, I do.

Q. All right. A. Joe Donnoly said to one of our officers, he said that Bill Rickert should be contacted regarding whether we should be allowed to be out there or not.

MR. EDWARDS: Reece, could I get off the record for just one minute? This is a matter of public relations.

(Thereupon there was a short discussion off record.)

Q. (BY MR. EDWARDS) Mr. Moody, just before passing on this particular situation, what activity was the Hillsboro Bank carrying on at the shopping center at this time? A. We had a card table out there and we had some signs advertising.

Q. Did you have a representative out there? A. Automobile financing. Yes, we had a man at the table.

Q. And were these people offering to discuss the ramifications of financing automobiles? A. We didn't get to stay out there long enough to discuss it.

Q. Was it your intention to do this? A. Of course, yes.

Q. So that you all were going to talk about the various aspects of financing any cars that anybody wanted to buy? A. Since the First National had their establishment out there we thought they would be there, and we thought we would be remiss, is that the word, if we were not there.

Q. And this was its intention, although it was short-lived as a result of these things which you have now testified? A. If the automobile dealers sell cars and help the customers get them financed, that was the sole purpose.

Q. Would you all have actually dealt with the customers there or fixed up his contract for him there? A. No, we couldn't do that, Mr. Edwards, that's against the banking regulations.

Q. What activity did you intend to do there? A. Distribute literature and discuss generally what kind of terms we could offer, and ask them to come to the bank or to work through the dealer to handle the loan.

Q. Mr. Moody, do you all have any customers that are now using the armored car service, and again please don't

identify them by name, talk about them in generalities, do you have customers that use armored car service regularly? A. You're referring to security transport?

Q. Well, any armored car service. A. Yes.

Q. Could you tell me approximately how many such customers? A. I could not.

Q. Has your bank made arrangements for any of these customers to use this armored car service, any armored car service? A. Not directly with the customer.

Q. Would you give me, have you made arrangements for them to use it? A. Have I personally?

Q. Or your bank organization. A. We have not arranged for the customer to use this service. This arrangement is made with the armored car owners and our customers.

Q. Does the bank in any way pay for the services used by any customers? A. We do not.

Q. Do you give any credits or discounts, discount is not the word, but some corresponding cut in cost as a result of this cost? A. (Indicating negatively.)

Q. So that any customer using an armored car service pays for it, pays for the service themselves? A. The users of the armored car service at the Hillsboro Bank pay all of the costs incident thereto.

Q. Now, I'm lost. Give me that answer again, please, sir. The users pay their own costs, is that what you said? A. Yes.

Q. Excuse me. What procedure is followed with customers that use armored car services as far as how the cash and items are handled? Could you tell me the procedures that are followed? A. The armored car representative brings the deposits in a bag. The bag is re-

ceipted for and the contents are counted, or they come and pick up the bag with money and take it out to the stores.

Q. When the armored car driver or agent comes to the bank he hands you a package that has cash or items in it? A. Yes.

Q. And what do you do at that point? A. We receipt for that.

Q. To the armored car driver or agent? A. Yes.

Q. And then what do you do? A. We open the bag and count the contents, distribute it to the customer's account.

Q. When is the deposit receipt, or when do these moneys become a deposit in the bank? A. When it is received by the, our teller and receipted for.

Q. Now, is this the point whenever the armored car agent hands over the bag, or does this transpire at some later point? A. It would transpire when the bag was opened and the contents verified, then the receipt would be issued to the customer.

Q. So, at the time the bag comes in it's given to one or more of your people, it's taken somewhere and then opened? A. Yes.

Q. After it's opened, counted and verified, if the figure is correct it then is deposited to the bank? A. Right.

Q. What is your responsibility for these funds up until the time that it's opened, counted, verified and a deposit slip made?

MR. SMITH: I object to the question. It calls for a legal conclusion.

MR. EDWARDS: Strike the question.

Q. (BY MR. EDWARDS) In the event that the moneys represented to be in the bag are not there, what is your

procedure, Mr. Moody? A. We notify the customer that "X" numbers of dollars are short, or a check listed is missing.

Q. And whose responsibility is that? Is that the customer's responsibility to do something about correcting it then? A. Yes.

Q. So that you then decrease the amount of, actually deposited or wait until he corrects it? A. Or add to it if it's over.

Q. How do you work your night depository service? A. Well, the customer has a bag with a lock on it. He drops the locked bag into the night depository receptacle. We have two people that are responsible for removing the bag from the night depository, at which time they're opened. The contents are verified unless we have arrangements to the contrary. Some customers retain their key to the lock and the bag remains locked until they come in, then it's unlocked.

Q. Do you require any kind of contractual agreement, do you sign a contractual agreement with these users of the night depository receptacle? A. Yes.

Q. And what is the contents generally of this?

MR. SMITH: Objection. The document speaks for itself.

A. I didn't bring any documents with me.

MR. SMITH: We will furnish you one if you want it.

MR. EDWARDS: That's good, let me have it.

MR. SMITH: Pardon?

MR. EDWARDS: Let me have a copy of it.

MR. SMITH: I'll stipulate that a copy of the so-called night depository contract can be attached to this deposition as Plaintiff's Exhibit 1 for identification.

Q. (BY MR. EDWARDS) Mr. Moody, at the time that the night depository bags are placed in the night depository receptacle are these deposits in your bank according to your understanding of the bank practice? A. (Indicating negatively.)

Q. When do these moneys become deposits in your bank, according to your banking practice? A. When they are receipted by the teller.

Q. Which time-wise is after they have been taken out of the night receptacle, counted, verified and a deposit slip made, is that right? A. Yes.

Q. Until that time you have not accepted that as a deposit of funds, is this true?

MR. SMITH: You're still asking the witness his understanding of a legal concept, is this correct?

MR. EDWARDS: I'm asking him as to the standard banking practice, which I believe a man of his long experience in banking can testify as to what the custom and practice is in the trade.

MR. SMITH: Well, if you're asking him that then you're not asking him peculiarly how the Hillsboro does it.

MR. EDWARDS: I'm asking him as to the activities of the Hillsboro and what the standard practice of the Hillsboro is.

MR. SMITH: He can describe it factually, but if you're asking for legal conclusions I direct him not to answer.

Q. (BY MR. EDWARDS) Mr. Moody, what kind of insurance coverage do you have on these particular items which your bank handles, the ones that are dropped in the night receptacle? A. I'm not prepared to describe the exact insurance coverage that we have there, Mr. Edwards.

Q. You just don't know? A. We have insurance that would protect the customer, but I have not read this policy in years. I am not connected directly with the administration of this facility.

Q. Do you know of your knowledge whether or not the insurance, casual insurance coverage which you carry would cover a customer with moneys on the way to the bank, cash or items? A. I don't know about that.

Q. You just don't know what the coverage would be, of your policy is? A. I do not know.

Q. Are you able to testify as to the dollar damage which the Hillsboro Bank has experienced as a result of the activities complained about in this proceedings since the beginning, up until the date of the taking of this deposition? A. I could not give you in dollars and cents, as I mentioned before, it's an erosive sort of thing that has happened in Panama City, for example. When you start out, why, possibly they split accounts to get the service, and then get the foot in the door and you lose customers this way.

Q. Are you able to ascertain that the Hillsboro Bank has suffered any dollar damage as of the date of the taking of this deposition? A. Yes.

Q. And can you estimate or put any figure on the dollar damage experienced by the Hillsboro Bank to date?

MR. SMITH: Are you prepared to give us the figures, the amount of the deposits of Grant's, McCrory's, Colony Shops?

MR. EDWARDS: If you can prove to me you would have gotten them anyway, yes.

Q. (BY MR. EDWARDS) What was your answer, Mr. Moody? A. I don't see how I could give you an intelligent answer to that, Bob.

Q. So, you're not able to fix any dollar damage as far as—you feel that there is some, you can't put a figure on it? A. And I think that it's an increasing amount every day that the truck runs, I think it's an increasing amount.

Q. Is there any criteria by which these damages can be arrived at or calculated in your knowledge? A. It would have to be a comparative sort of thing.

Q. Could you describe to me your knowledge of the activities which are carried on by the First National Bank as to the mechanics of them by which they are alleged to become deposits prior to reaching the banking premises, as alleged in your counter claim? A. I have no knowledge of the exact mechanics of the operation of the truck.

Q. Mr. Moody, it has been alleged by your institution that this constitutes branch banking. Would you describe to me the facts which constitute branch banking as you know them? A. When I wrote to Mr. J. V. Chapman, who is the Deputy Commissioner of Banking, requesting permission to operate a similar vehicle, he described this as branch banking in the worst form. The attorneys tell me that according to the laws of the State of Florida, which a commercial bank is allowed to offer banking service from only one location, and certainly this is in their judgment offering services from more than one location—

Q. Now, do you have knowledge of the services which are being offered which constitute the active branch banking, or would you testify to those? A. Well, by inference in September when the truck was first shown it was described as a mobile teller's unit, and so by inference you would suppose that this truck would offer any service that you might expect to receive at any teller's window.

Q. Do you know that that service has actually been offered or has been rendered in the general vicinity of the banking area? A. I do not know.

Q. Do you have any knowledge of any fact that this kind of an operation has been carried on by the First National Bank? A. I do not.

Q. As you just described? A. (Indicating negatively.)

Q. Do you have any knowledge of any fact which, of any activity actually transacted which would constitute the acceptance of a deposit outside of the banking house of the First National Bank? A. I do not except by inference, when a customer might expect to receive that.

Q. Do you have any knowledge of where, of any time that the First National Bank in the operation of its facilities have actually cashed checks or paid checks outside of the banking house? A. I do not.

Q. Do you have any knowledge of any time it has loaned money or negotiated a loan outside of its banking house? A. No.

Q. Do you know of any person in your organization who has knowledge of such facts? A. No.

Q. Mr. Moody, from time to time does your organization negotiate or close loans outside of its banking house? A. Not as I understand your question.

Q. Do you know whether or not any agent or employee of your bank has ever accepted a deposit outside of the banking house, either with permission or without permission? A. Someone might hand an employee a check on the outside and say, "Please deposit this to my account," and then the receipt would be issued at the bank.

Q. Is this done with any degree of frequency? A. No.

Q. But it has transpired to your knowledge? A. Yes.

Q. Well, what did the employee do whenever this was handed to them? A. He thanked them for the deposit, thanked them for the check and took it to the bank and

deposited it and issued a receipt for it and mailed it or delivered it, at least I hope that he thanked them.

MR. EDWARDS: You may inquire.

MR. SMITH: No questions.

Mr. Moody, under the Florida Rules, Federal Rules of Civil Procedure, you have a right to read and sign this testimony after it's transcribed. In the alternative you may waive it, and as your attorney I think it's all right for you to waive it.

THE DEPONENT: Waive it.

MR. SMITH: File the originals as we did with the others.

MR. EDWARDS: Reece, I think this is my option, whether to file it or not.

MR. SMITH: I don't think so. I think the Federal Rule requires you to file it.

(Thereupon at 11:40 A.M. the taking of this deposition was concluded.)

Plaintiff's Exhibit No. 1 to the Deposition of Frank H. Moody is set out on the next two pages.

(Exhibits Not Reproduced)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

MOTION FOR SUMMARY JUDGMENT —FILED MARCH 20, 1967

THE FIRST NATIONAL BANK IN PLANT CITY, Plaintiff, by and through its undersigned attorney, moves this Court for entry of a Summary Judgment against the Defendant, FRED O. DICKINSON, JR., Comptroller of the State of Florida, Ex Officio Commissioner of Banking; and, THE HILLSBORO BANK, FIRST RUSKIN BANK and PEOPLES BANK OF LAKELAND, as Intervening Defendants, for that the pleadings and depositions on file together with the affidavits attached hereto demonstrate that there is no genuine issue as to any material fact and that the Plaintiff is entitled to a judgment as a matter of law.

/s/ Robert S. Edwards of the firm of
Edwards and Sawyer
Attorney for The First National Bank in Plant City
P. O. Box 1119
Plant City, Florida

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF WILLIAM M. RICKERT —FILED MARCH 20, 1967

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH.

WILLIAM M. RICKERT, having first been duly cautioned and sworn says:

1. That he is the President and Chief Executive officer of THE FIRST NATIONAL BANK IN PLANT CITY, a bank chartered by the Comptroller of the Currency of the United States on the 26th day of September, 1956, pursuant to the National Banking Act.

2. That in the month of September, 1966 THE FIRST NATIONAL BANK IN PLANT CITY purchased an armored truck and offered as an additional banking service to call at a customer's place of business to pick up cash and items that they might have and to transport said valuables to the banking house of THE FIRST NATIONAL BANK IN PLANT CITY so that they might safely reach the bank and be deposited to the account of the customer involved. All customers who express an interest in said service receive an explanation that the cash and items to be transported will be transported by the messenger service as the agent of the customer and an agreement to that effect is signed. The agreement is designated a dual control contract, a copy of which is attached hereto marked Exhibit "A". Items to be transmitted to the bank are itemized on a transmittal slip that also specifies that the mesenger service, operated by THE FIRST NATIONAL BANK IN PLANT CITY, is acting as agent of the customer and this slip containing a list

of the items transmitted accompanies each transmittal. See Exhibit "B".

3. The messenger service operated by THE FIRST NATIONAL BANK IN PLANT CITY also transports cash to the customers of THE FIRST NATIONAL BANK IN PLANT CITY. This is done pursuant to agreement with the customer that cash at the time it is taken from the banking house of THE FIRST NATIONAL BANK IN PLANT CITY is the property of the customer, the charge is made to the customer's account and confirmed by the document attached hereto marked Exhibit "C". It is agreed that the cash so transmitted is the property of the customer at the time the charge is made by the employee of the bank and turned over to the messenger for delivery.

4. THE FIRST NATIONAL BANK IN PLANT CITY also maintains an area in the Plant City Plaza known as the Plant City Mall where a secured receptacle is installed. At this receptacle all FIRST NATIONAL BANK IN PLANT CITY'S customers in the Plaza having night bags or transmittal bags are issued a key and these customers place their bags containing cash and items to be transported in the receptacle in the same manner in which they would place them in the night depository if they drove to the banking house. Additionally, envelopes and transmittal slips are available so that any customer of THE FIRST NATIONAL BANK IN PLANT CITY may place in the receptacle cash and items they wish transported to THE FIRST NATIONAL BANK IN PLANT CITY. Two signs clearly displayed, one of which is 12" x 18" advises all users that the items dropped in the receptacle will be transported to the bank by a messenger acting as agent for the customer.

5. The activities above outlined are authorized by the United States Comptroller of the Currency by Paragraph 7490 of the Comptroller Manual, an excerpt of which is

attached hereto marked Exhibit "D". The operation of the receptacle at the Plaza is authorized by letter from Robert L. Schwind, Regional Counsel for the Administrator of the Sixth National Bank Region, a copy of which is attached marked Exhibit "E".

6. Activities of the messenger service are specifically restricted to those outlined above and the activities of the service has not varied from these procedures.

7. The messenger service rendered by THE FIRST NATIONAL BANK IN PLANT CITY was brought about because of the need for the service by our customers. Economical safe transportation of funds in our city has always been a problem. The service inaugurated has been enthusiastically received by our customers and has filled a need of many customers.

/s/ William M. Rickert

Exhibit "A" attached to the Affidavit of William M. Rickert is the same as Exhibit 2 of the Deposition of William M. Rickert and is set out here at page 91.

Exhibit "B" attached to the Affidavit of William M. Rickert is the same as Exhibit 3 of the Deposition of Charles Futch and is set out here at page 123.

EXHIBIT "C"

THE FIRST NATIONAL BANK
IN PLANT CITY
MESSENGER SERVICE

Your account has been charged for the TOTAL shown hereon representing monies requisitioned for delivery to you by bank's messenger.

Date_____ Approved_____

_____

_____

_____
Authorized Signature

Twenties	$	
Tens		
Fives		
Ones		
Halves		
Quarters		
Dimes		
Nickels		
Pennies		
TOTAL	$	

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

PLAINTIFF-INTERVENOR'S MOTION FOR SUMMARY JUDGMENT—FILED MARCH 20, 1967

Plaintiff Intervenor, William B. Camp, Comptroller of the Currency of the United States, by his undersigned attorneys moves the Court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the ground that there is no genuine issue of material fact and plaintiffs are entitled to judgment as a matter of law.

In support of this motion the Court is respectfully referred to the Affidavit of William B. Camp, attached hereto, and to the memorandum of points and authorities filed herewith.

Respectfully submitted,

/s/ Barefoot Sanders
Assistant Attorney General

/s/ Clinton N. Ashmore
United States Attorney

/s/ Harland F. Leathers
/s/ Lester A. Jensen
Attorneys, Department of Justice

Attorneys for Intervenor-Plaintiff, William B. Camp, Comptroller of the Currency of the United States

Of Counsel:

/s/ Robert Bloom
Chief Counsel

/s/ Richard S. Beatty
Associate Chief Counsel

Office of the Comptroller
of the Currency

Affidavit

DISTRICT OF COLUMBIA, ss:

William B. Camp being duly sworn, deposes and says under oath that:

1. I am Comptroller of the Currency duly appointed by the President of the United States, and, as Comptroller of the Currency, I have responsibility for the administration of the National Bank Act, Title 12, U.S.C., Section 1 et seq., and for supervision and regulation of the approximately 4,800 national banks now operating pursuant thereto.

2. I make this affidavit in support of my Motion for Summary Judgment and in supplement of my affidavit dated February 15, 1967, filed herein in support of Motion for Leave to Intervene as a Party Plaintiff.

3. Since at least 1929 the office of the Comptroller of the Currency has consistently ruled that it is within the statutory powers of national banks to provide messenger services for the pick up and delivery of monies and other items from and to their customers. This position has been regularly stated in letter rulings, four of which are annexed hereto as representative of them all (Ex's. "A-D"). In 1963 the longstanding position of this office was restated as a general ruling and published at paragraph 7490 of the *Comptroller's Manual for National Banks.* A copy of that ruling is annexed hereto as Ex. "E".

4. Throughout this period it was the considered opinion of this office that the operation of a messenger service by a national bank did not constitute branch banking so long as deposits were not received, checks paid or money lent at any place away from the bank's premises. The above-cited Ruling No. 7490 is an affirmation of this position.

5. The records of this office show that in reliance upon the rulings and interpretations of this office, national banks in at least thirteen states (Washington, Georgia, Illinois, Michigan, New Jersey, Arizona, Texas, Connecticut, Massachusetts, Rhode Island, Pennsylvania, Arkansas, and Florida) have offered messenger service identical or similar to that now being offered by First National Bank in Plant City. It is likely that such services have also been rendered in various other states not referred to in the records of this office.

6. The operation of messenger and receptacle services is incidental and necessary to the banking business as conducted by national banks today. The receipt of deposits is essential to national banks' survival and growth, and a substantial proportion of many national banks' deposits are made by retail merchants. It has been the experience of this office that messenger and off-premises receptacle services are useful and practical means of facilitating deposit transactions. The deposit of receipts and the withdrawal of funds for the purpose of making change and meeting payrolls are routine daily functions of many retailers, and anything that national banks can do to facilitate these functions is clearly beneficial to all concerned. The off-premises receptacle and messenger services do facilitate these routine deposits and withdrawals by relieving the merchant from the task of traveling to the bank personally. The bank benefits by acquiring or retaining the patronage of the customers who utilize these services. The widespread use of night depository chutes indicates that retail merchants require banking services other than those which can be conducted on the bank's premises during business hours. Off-premises receptacle and messenger services are authorized to enable national banks to meet the present day requirements of these customers. National banks, like all other competitive enterprises, must continuously adapt their activities to the needs of their customers.

7. It is my considered opinion that the operation of off-premises receptacle and messenger services are sound and safe banking practices. When these services are operated pursuant to the applicable rulings of this office, the national bank does not incur any undue risks. In no case is the bank responsible for any funds that are not in its possession at its premises. Thus a national bank's operation of these services in no way increases its exposure to loss.

EXHIBIT A

Taken from Mrs. Fox's file—7/11/50.

Bank of the Manhattan Co. Jamaica, N.Y. City, Mch. 16, 1929.

(FGA)

Armored car used to collect deposits.

Reference is made to your various inquiries in regard to whether or not the office of the Comptroller of the Currency has made a ruling restricting banks from taking up deposits by messenger.

While this office is not disposed to encourage the use of armored cars, or any other agency, for the collection or receipt of deposits which under ordinary circumstances should be received at the banking house of a national bank, in the opinion of counsel, to whom this question has been referred, however, it will be difficult to sustain a general ruling that the use of an armored car for the purpose of collection of a deposit of a bank's customer is illegal. A bank, as an incident of its business, uses its runners or agents to collect notes, drafts and bills of exchange for customers or correspondent banks. By analogy, it might be claimed that it has the right to send an agent or employee to collect a deposit which a customer desires to make. The purpose in each case, therefore, must be considered in determining the legality.

This office has never made any ruling prohibiting national banks from picking up deposits by messenger.

EXHIBIT B

Pres., Frost N.B., San Antonio, Texas., Mch. 6, 1929.

(JWP)

Armored car used to collect deposits.

Your letter of February 21, with reference to the use of armored cars, has been received.

This office is not disposed to encourage the use of armored cars, or any other agency, for the collection or receipt of deposits which under ordinary circumstances should be received at the banking house of a national bank. In the opinion of counsel, to whom this question has been referred, however, it will be difficult to sustain a general ruling that the use of an armored car for the purpose of collecting a deposit of a bank's customer is illegal. A bank, as an incident of its business, uses its runners or agents to collect notes, drafts and bills of exchange for customers or correspondent banks. By analogy it might be claimed that it has the right to send an agent or employe to collect a deposit which a customer desires to make. The purpose for which the armored car is used must, therefore, be considered in each case in determining its legality.

If a bank should undertake to use an armored car as a place of business for opening accounts, receiving deposits, making loans, and in general for conducting the banking business at some place other than at its home office, as you suggest, it might be held by the courts to have been used as a branch bank in which case its use would clearly be ultra vires.

You are correct in stating that it is customary for banks in some places to be equipped with armored cars,

which practice, however, experience has demonstrated is much easier to start than to stop. It frequently engenders spirited competition and I think that before such a service is installed, it should have the most careful consideration.

EXHIBIT C

(Bank transporting currency at night and making charge therefor)

July 11, 1941

My dear Mr. O'Brien:

With further reference to your letter of June 24, 1941, wherewith you enclosed a communication directed to you by Mr. A. T. Doyle of the Doyle Detective Bureau Armored Car Service, Inc., of Rochester, New York, please be advised that we have ascertained that the First National Bank of Batavia, New York, transports currency from its banking house to the track of the Genesee-Monroe Racing Association and back during a short period each year, under police protection. The Genesee-Monroe Racing Association is a customer of the bank and maintains an account there. Under the circumstances, we are of the opinion that the First National Bank of Batavia can legally provide this service to its customer.

We are enclosing an extra copy of this letter for your convenience in communicating with Mr. Doyle.

Yours very truly,

(Signed) G. B. Upham
Deputy Comptroller

Enclosure

Honorable Joseph J. O'Brien
House of Representatives
Washington, D. C.

JLR GPB Y H WF

JLR:DSM-7/8/41

EXHIBIT D

Baker 3

May 14, 1954

Mr. C. H. White, Vice President & Cashier,
Northwestern National Bank in Philadelphia,
700 North Broad Street,
Philadelphia 30, Pennsylvania.

Dear Mr. White:

We have received your letter of April 22, 1954, with which you enclosed a copy of an agreement which you propose to use in connection with your transactions with certain customers engaged in the check-cashing business.

If you will recall our conference of March 31, 1954, our principal objection to the present method of handling deliveries of cash to these customers was that it is not made clear just who is the owner of the currency and coin while it is in the process of shipment. To correct this, we suggested that an agreement be drawn which would provide that whenever an advance is made for which the customer has an insufficient balance in his account, such advance should be considered to be a loan.

We do not believe that the proposed agreement which you have submitted accomplishes this purpose, primarily because it provides that advances will not be considered to be loans unless there is an insufficient balance *at the end of the business day.* Thus, if the customer's balance in insufficient to cover a withdrawal at the beginning of the day, the withdrawal will be represented throughout the day as a cash item, and in our view the status of the currency and coin in shipment will still be in doubt.

The agreement should be amended, then, to provide that any withdrawal for which there is insufficient balance

should be considered to be a loan immediately upon removal of the cash from the bank by the customer's agent.

We note in the Board's letter of April 22 that arrangements have been made for these customers to present their checks to the bank prior to the delivery of the cash to the customer's agents. If this is the practice, there will be no question of the bank having in its possession an evidence of debt, since the agreement together with the checks may be considered to be such evidence.

Yours very truly,

Deputy Comptroller of the Currency

ELL:eb

Apr. 30 1954

Exhibit "E" attached to the Affidavit of William E. Camp is set out here at page 381.

ANSWER AND DEFENSES

(Caption Omitted)

(Filed March 20, 1967)

COMES NOW the Defendant, Fred O. Dickinson, Jr., Comptroller of the State of Florida and Ex Officio Commissioner of Banking, by his undersigned attorney and hereby files his Answer and Defenses to Intervening Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief and says that:

FIRST DEFENSE TO COMPLAINT

The Complaint filed herein and each Count thereof fails to state a claim upon which relief can be granted as to this defendant.

SECOND DEFENSE TO COUNT I

Answering Count I of the Complaint filed herein, and the numbered paragraphs thereof, defendant says:

1. Defendant Dickinson admits the facts alleged in paragraph 1.
2. Defendant Dickinson admits the facts alleged in paragraph 2.
3. Defendant Dickinson admits the facts alleged in paragraph 3.
4. Defendant Dickinson admits that the Comptroller of the Currency has issued the rulings set forth in paragraph 4, but denies all other allegations in paragraph 4.
5. Defendant Dickinson admits the facts alleged in paragraph 5.
6. Defendant Dickinson admits the facts alleged in paragraph 6.
7. Defendant Dickinson denies the facts alleged in paragraph 7.
8. Defendant Dickinson admits the facts alleged in paragraph 8.
9. Defendant Dickinson admits that national banks are creatures and instrumentalities of the United States subject to the paramount authority of Congress to legislate with respect to their operations, but denies all other allegations in paragraph 9.
10. Defendant Dickinson denies the allegations in paragraph 10.
11. Defendant Dickinson denies the allegations in paragraph 11.
12. Defendant Dickinson denies the allegations in paragraph 12.
13. Defendant Dickinson denies the allegations in paragraph 13.

SECOND DEFENSE TO COUNT II

Answering Count II of the Complaint filed herein, and the numbered paragraphs thereof, defendant says:

1. Defendant Dickinson realleges all admissions and denials of its answer to paragraphs one through thirteen inclusive of Count I herein.
2. Defendant Dickinson admits that the establishment of national bank branches is governed by 12 U.S.C. Section 36 but denies the other allegations contained in paragraph 2.
3. Defendant Dickinson denies the allegations in paragraph 3.

THIRD DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant would show unto the Court that the establishment, use and operation of the armored car owned by plaintiff national bank and operated under its direction by its employees for the purpose of receiving deposits and for other banking purposes, and/or the establishment, use and operation of the money depository facility at a place about a mile from its banking house for the purpose of receiving deposits, constitute branch banking by plaintiff national bank in violation of Title 12, United States Code, Section 36, and Sections 659.06 and 659.52, Florida Statutes, 1965, and the above-described practices and activities of plaintiff national bank are consequently not legally authorized by intervening plaintiff and are illegal and unlawful.

FOURTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant Dickinson would show unto the Court that, by virtue of the establishment, use and opera-

tion of the armored car owned by plaintiff national bank and operated under its direction by its employees for purposes of receiving deposits and for other banking purposes, and/or by virtue of the establishment or leasing, use and operation of an off-premises money depository facility for receiving deposits at a place about a mile from its banking house, plaintiff national bank is engaged in the general practice of banking at a place other than that specified in its organization certificate and in branches not established and maintained by plaintiff national bank in accordance with the provisions of Title 12, United States Code, Section 36. Plaintiff national bank therefore is violating the provisions of Title 12, United States Code, Section 81, by engaging in the above-described practices and activities, which practices and activities are not legally authorized by intervening plaintiff, and plaintiffs are not entitled to the relief sought.

FIFTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant Dickinson alleges that neither the establishment, use and operation of the armored car operations of plaintiff national bank nor the erection or leasing, operation and maintenance by plaintiff of the off-premises money depository facility is expressly authorized by the laws of the United States of America, and such practices and activities are not necessary incidents of the banking business or incidental powers necessary to carry on the business of banking or incidental powers existing to carry into effect such powers as are granted by the laws of the United States of America. Said practices and activities on the part of plaintiff are therefore not legally authorized by intervening plaintiff, but are unlawful and in contravention of Title 12, United States Code, Sections 24, 36 and 81.

SIXTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant alleges that plaintiff national bank is not legally authorized by intervening plaintiff to perform its armored car operations and/or to establish or lease, use and operate its off-premises depository facility by the provisions of paragraph 7490 of *The Comptroller's Manual for National Banks* and the letter of June 29, 1966, from the Regional Comptroller of the Currency, because the operations allegedly authorized therein, as applicable herein, are invalid, illegal and void, and paragraph 7490 and the aforesaid letter are in contravention of Title 12, United States Code, Chapter 2, Sections 1, 24, 36 and 81.

SEVENTH DEFENSE TO ALL COUNTS OF THE COMPLAINT

Further defending against the Complaint, and each Count thereof, defendant alleges that, if paragraph 7490 of *The Comptroller's Manual for National Banks* and the letter of June 29, 1966 constitute valid rulings of the intervening plaintiff, and, if the same are otherwise authorized by law, the same nevertheless contemplate and authorize only the use by a national bank of an independent messenger service which is not an instrumentality of the national bank. The same therefore does not authorize plaintiff national bank to furnish such messenger service as an instrumentality of the bank, either under the guise of an agreement that the plaintiff national bank's messenger service is an agent for the depositor or otherwise. The said practices and activities of plaintiff national bank are not legally authorized by intervening plaintiff and are unlawful and illegal.

Counterclaim

COMES NOW the Defendant Fred O. Dickinson, Jr., Comptroller of the State of Florida, and Ex Officio State Banking Commissioner by his undersigned attorney and files this his Counterclaim against the intervening plaintiff and says:

FIRST CLAIM

1. Defendant Dickinson is the Comptroller of the State of Florida and Ex Officio, the State Commissioner of Banking and as such is an official of the executive branch of the government of the State of Florida. He maintains his residence and offices in Tallahassee, Leon County, Florida.
2. Intervenor-plaintiff is the Comptroller of the Currency of the United States.
3. The action arises under Title 12, United States Code, Sections 36 and 81.
4. This is a proceeding for a declaratory judgment and an injunction pursuant to 28 United States Code 2201 and 2202, and other applicable law.
5. This Court has jurisdiction pursuant to Title 28, United States Code, Section 1331, Title 12, United States Code, Sections 36 and 81. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.
6. Plaintiff has prior to the commencement of this action, and continues to operate a receptacle or depository for the receipt of deposits about one mile from its banking office, in violation of Title 12, United States Code, Section 81 which restricts its operation as a bank to one location, namely its banking office at 302 West Haines Street, Plant City, Florida.
7. Plaintiff has, prior to the commencement of this action, and continues to operate as its agency an armored car owned by it and operated by its employees for the purpose of soliciting and obtaining deposits and for other banking purposes at many places away from its said banking office, in viola-

tion of Title 12, U.S.C., Section 81 which restricts its operation to one location as aforesaid.

8. Plaintiff, by using said receptacle and armored car, is operating branches as defined in Title 12, U.S.C., Section 36 and prohibited by Title 12, U.S.C., Section 36 by virtue of Section 659.06 (1) (a) of Florida Statutes.

9. Plaintiff, in view of the fact that it operates said receptacle and armored car operation as its agencies, instrumentalities and places of business off-premises is in violation of said letter of June 29, 1966, referred to in paragraph 6, Count I of the Complaint and said paragraph 7490 of *The Comptroller's Manual for National Banks* referred to in paragraph 7 of Count I of the Complaint.

10. Unless restrained, Plaintiff and other national banks in Florida will continue and spread the use of such receptacles and armored car operations, to the detriment and irreparable and increasing damage of state banks in Florida.

11. Unless restrained, Plaintiff bank and other national banks operating in Florida will continue to have, and increasingly will have, competitive advantage over state banks in the relevant competitive areas, for the reason that state banks under Florida law are prohibited from operating such receptacle and armored car facilities; and that such competitive disadvantage for state banks is contrary to the basic concept underlying the intent of Congress in enacting Title 12, U.S.C., Section 36 and other similar laws which govern the basic operations of national banks according to the state law governing state banks wherever national banks conduct their business.

12. Among the duties of Defendant Dickinson is the enforcement of the banking laws of the State of Florida, particularly Sections 659.06 (1) (a) and 659.52, Florida Statutes and particularly to enforce these laws pursuant to the federal laws, Title 12, U.S.C., Sections 36 and 81, which bind national banks to the restrictions imposed upon state banks

by said state laws; and Defendant has the right to protect state banks as state instrumentalities from the competitive disadvantages inherent in Plaintiff's operation of receptacle and armored car facilities which facilities are denied to state banks by virtue of state law.

WHEREFORE, Defendant prays

(a) That the Court take jurisdiction of the parties and subject matter hereof.

(b) That the Court declare and adjudge that the off-premises receptacle and armored car facilities of Plaintiff constitute operation of branches in violation of Title 12, U.S.C., Sections 36 and 81 in combination with Section 659.06 (1) (a) of Florida Statutes.

(c) That the Court enter a judgment declaring and adjudging that the letter of June 29, 1966, referred to in paragraph 6 of Count I of the Complaint and paragraph 7490 of *The Comptroller's Manual for National Banks*, referred to in paragraph 7 of Count I of the Complaint do not constitute lawful authority for the off-premises armored car operations of plaintiff national bank and/or for the off-premises money depository facility of plaintiff national bank, and that said rulings have no force and effect on national banks located in the State of Florida.

(d) That the Court enter an order temporarily restraining, and thereafter permanently enjoining the Comptroller of the Currency and his successors from granting authority or permission to plaintiff and other national banks located in the State of Florida from operating and using off-premises armored cars or off-premises money depository facilities.

(e) That the Court dismiss the Complaint of intervening plaintiff the Comptroller of the Currency, filed herein.

(f) That the Court grant such other and further relief as it deems meet and proper.

(g) That Defendant have his costs and reasonable attorney's fees herein.

SECOND CLAIM

1. Defendant Dickinson realleges and by reference makes a part hereof each and every allegation in paragraphs 1 through 12 of the First Claim hereof.
2. By performing the above-described activities and operations, First National is engaging in the general business of banking, including the receiving of deposits, at places other than 302 West Haines Street, Plant City, Florida, and at places other than branches established and/or operated or maintained by plaintiff in accordance with Title 12, United States Code, Section 36, in violation of Title 12, United States Code, Section 81. As has been previously alleged in the First Claim herein, the establishment, operation and maintenance of branches of the First National Bank in Plant City is not valid or authorized under Title 12, United States Code, Section 36.
3. Said activities of First National are not legally authorized by the Comptroller of the Currency, the laws of the United States or the laws of the State of Florida.
4. Said activities of First National constitute illegal and unauthorized competition with state banks chartered pursuant to state law through plaintiff national bank's aforesaid performance of the general business of banking at places other than 302 West Haines Street, Plant City, Florida, which places are not branches established or maintained by plaintiff national bank in accordance with the provisions of Section 36 of Title 12, United States Code. As a result of said illegal and unauthorized competition on the part of plaintiff national bank and said illegal authorization therefor by intervening plaintiff, state banks chartered pursuant to state law have lost and/or will in the future lose substantial banking business because state banks chartered pursuant to state law are prohibited by state law from meeting said competition by sim-

ilarly performing its general banking business at places other than that at which it now is located. Therefore, state banks chartered pursuant to state law are unable effectively to compete with First National for banking business. The state banks chartered pursuant to state law and the value of its business have already been substantially and irreparably damaged because of the aforesaid practices and illegal competition of plaintiff national bank and said illegal authorization thereof by intervening plaintiff. If the relief sought herein is not granted, its damage will continue indefinitely.

WHEREFORE, defendant Dickinson prays:

(a) That the Court take jurisdiction of the parties and subject matter hereof.

(b) That the Court enter a judgment declaring and adjudging that the above-described practices and activities of the First National Bank in Plant City in operating and using its off-premises armored car and in operating and using its off-premises money depository facility, violate Title 12, United States Code, Section 81.

(c) That the Court enter a judgment declaring and adjudging that the letter of June 29, 1966, referred to in paragraph 6 of Count I of the Complaint and paragraph 7490 of *The Comptroller's Manual for National Banks*, referred to in paragraph 7 of Count I of the Complaint do not constitute lawful authority for the off-premises armored car operations of plaintiff and/or for the off-premises money depository facilities of plaintiff.

(d) That the Court enter an order temporarily restraining, and thereafter permanently enjoining, the Comptroller of the Currency and its successors from authorizing or permitting plaintiff and other national banks located in Florida from operating and using off-premises armored cars and further from operating and using off-premises money depository facilities in accordance with activities

and practices more fully described herein, and further from engaging in such other and similar practices and activities as do violence to the laws of the United States of America and/or the laws of the State of Florida.

(e) That the Court dismiss the Complaint of the Comptroller of the Currency filed herein.

(f) That the Court grant such other and further relief as it deems meet and proper.

/s/ V. Carroll Webb
Attorney for Fred O. Dickinson, Jr. Comptroller of the State of Florida, Ex Officio Commissioner of Banking

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF MRS. DORIS B. PREWITT —FILED APRIL 24, 1967

• • •

Deposition of MRS. DORIS B. PREWITT, taken pursuant to notice this 29th day of March, 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at 107 South Evers Street, Plant City, Florida, beginning at the hour of 10:45 o'clock A. M.

Thereupon the said

MRS. DORIS B. PREWITT,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Mrs. Prewitt, would you state your full name, please? A. Doris Brannon Prewitt.

Q. And what is your residential address? A. 1108 North Pennsylvania, Plant City.

Q. And what is your occupation or profession? A. Assistant Cashier and Head Bookkeeper, First National Bank.

Q. How long have you been employed by the First National Bank? A. A little over five years.

Q. You then have been employed by the First National throughout the time that it offered its armored car service and off-premises facilities at Plant City Plaza? A. Yes.

Q. Now, what are your duties as assistant cashier and bookkeeper? A. Well, as assistant cashier I sign checks, but—cashier checks when another officer out front—the tellers, they'll come back and have me sign them if they're missing from out front; and then as head bookkeeper, I have three girls that work all day and two that come in at noon in the bookkeeping department and a proof operator. Well, I balance the—our bookkeeping activity every morning that comes in with the general ledger. That takes quite a long time.

Q. We'll get into it more particularly later on. A. All right.

Q. But, generally, how do you handle the bookkeeping at the First National Bank? A. Oh, the work is done on the computer at Marine Bank. Our work is all posted over there. Is that what you want?

Q. Yes. You get your original documents from the bank? A. They go through the proof machine and they are sent directly from there to the Marine Bank and they come back to us in the morning.

Q. And does the proof machine—is it a card punch sort of thing? A. No.

Q. What is the proof machine? A. It has several—well, it has 28 pockets on it and each item has a certain pocket that it goes in.

Q. Does it sort? Is that essentially what it does? A. It sorts automatically.

Q. Does it record any data while it's sorting? A. Yes. It prints the amounts on the checks or the deposits. It prints a number on the back as far as my proof machine and the date.

Q. And are these records which are made then kept in your bank for control against what is sent to the computer center? A. Well, now, our totals are sent with our work and tapes are sent with each thing, but it's all microfilmed before it goes over there.

Q. Now, going into specifics—the handling of specific transactions. When a customer of the bank presents a check drawn on his own account at the bank to be cashed, what is the procedure in terms of handling the document and bookkeeping which is followed from the time he hands the check across the counter, properly endorsed, to the teller or other bank officer? A. Well, our proof operator picks all the work up from the teller and runs it through the proof machine and then it goes with all the work to Marine.

Q. Do you know whether the teller, upon receiving the check physically— A. No. Now, I wouldn't know—

Q. Excuse me. Let me finish my question—then makes reference to the account of the customer to determine whether he has adequate balance to cover the check? A. I wouldn't know what they do out there, but they have a trial balance out there that they keep up every morning.

Q. Is the trial balance on each customer's account? A. Yes, on each customer.

Q. And it is available to them to make a physical check to determine if they have the money there? A. Right.

Q. And, then, if they pay the money out, they've got the check in return. Does this come from them, then, to bookkeeping? A. No. It goes to the proof department.

Q. When it goes to the proof department, what does the proof department do with it? A. She runs it through the machine, the proof machine and puts it in the pocket it should go in. If it's our customer, it goes in a pocket that will go to Marine.

Q. And it's gone over and put through their computer, sorter machine? A. Yes.

Q. And then they return to you the next morning a trial balance on that customer's account which would show a debit against the account to cover the check together with whatever charges made for cashing the check? A. Yes.

Q. Is a charge made at that time or is that charge made monthly? A. A service charge is made monthly.

Q. On the basis of the number of checks which move through the account? A. That's right.

Q. Now, changing my hypothetical situation to the situation where a customer of the bank has called to the bank on the recorder which is there and said this is John Jones at John Jones Shoe Store, and I need $25 in dimes tomorrow to be delivered by the armored car.

How is that handled within the bank, that order? A. I do not know anything about that.

Q. Do you know whether when the order is received there is any document drawn at that time or prepared at that time by a teller? A. I do not know. That's just out of my department, all that.

Q. Do you know whether any sort of document comes into your department showing these transactions? A. Yes, when we file them.

Q. What comes in to you? A. We have a debit and a deposit that's filed to a change account.

Q. Well, in the hypothetical I gave you, you wouldn't have any deposit I don't believe. You'd merely have the order for the money. A. No. No. Now—I don't know any-

thing about the order. I mean I never see those. Right? I never do. All we get in bookkeeping is the debit.

Q. You get the debit. The debit is a little white— A. Yellow.

Q. —or yellow piece of paper which shows the word debit on it some place—generally, the ones I've seen—or maybe the color indicates it's a debit. A. The color, I think.

Q. And it has the name of the customer and the amount of the money. A. And the account number.

Q. And the account number. Now, what does your department do with it? A. We cancel them in the mornings; and after the checks have been canceled and photographed, we file them.

Q. Well, now, how does a check come into this? A. A check?

Q. You said after the checks had been— A. Everything, a debit or a credit. As they go through the Recordak they are filmed and canceled for that day's date.

Q. That's if you've got a check involved, right? A. Well—

Q. Now, if you will follow me. Suppose there's no check. It's just a customer who has ordered money to be delivered by the armored car and somebody in the bank makes up a debit slip pursuant to that order which is received, and the debit slip comes to you. You mark it canceled to show that the money has gone out. A. That's right.

Q. And then you put it in your sorting machine. A. No. We file that.

Q. You just file it? A. Yes.

Q. Does anything go to Tampa? A. Well, it went to Tampa. We do not cancel them until they come back. I mean, we balance—

Q. Well, go with me then, step by step. A. Well, all right. After the work goes over the counter, the tellers give it to the proof operator and she runs it through the machine and, of course, she has to balance every day; and she photographs all this work and she also sends a slip to Marine with a batch number on the tape and a batch number on the slip and showing a total for that stack of checks, and they run them through the sorter and the computer and they balance and post them over there.

Q. All right. If you've got your debit from this person who's ordered change, just take that single debit and tell me, step by step, what would be done with it. A. Well, it would go through the proof machine and it would be included in a tape of checks or deposits, and this would go to the Marine and it would come back and after we balance and do all the things that we have to do with checks and deposits, we photograph them, cancel them, and then we're ready to file them.

Q. All right. Now, is there any difference between the way that a check is handled? For example, if I was a customer of the bank and I came with a check of the First National Bank drawn on my account in the First National Bank for, say, $25, which I had endorsed and I handed it to the teller and I get my $25. That's the one situation. A. Yes.

Q. Now, the other situation is where I'm out at my store and instead of coming to the bank and making a check, I make a call and say, "I want $25 in change sent to me through the armored car service." Somebody there takes my order and makes up the debit slip. Now, is there any difference in the way the check on the one hand and the debit slip on the other handled from the time it is received in your department? A. Oh, no, not when it gets in our department. It's just like a check in our department.

Q. Now, there is used, in connection with the armored car service, slips that are of design quite similar to the deposit slips, although the wording on them is different. These slips are called transmittal slips. Are you familiar with them? A. Messenger transmittal slips?

Q. Yes. A. Yes.

Q. Now, when I took Mr. Meriwether's—Billy Meriwether's deposition in connection with this case, he talked about validating the transmittal slip. Does that mean anything to you, and, if so, could you explain it to me? A. No, not right now. I don't know what he does.

Q. That would be something handled by the tellers? A. I guess it would be, because I do not know anything about that.

Q. Do you know if any customers of the bank have ever made payments on loans by using the Plant City Plaza depository or receptacle? A. No, I do not.

Q. Do you know if in operation of the armored car whether the personnel assigned to the armored car ever physically receive in hand, as distinguished from being in a bag or in an envelope, that they ever physically receive a check from a customer and bring it back to the bank and deliver it? A. No.

Q. Does your bookkeeping department have any responsibility regarding costs or cost accounting for the bank? A. Would service charges be?

Q. No. What I'm talking about now is do you ever study whether a given operation is operating at a profit or loss, and do you compile figures? A. No.

Q. For example, have you had anything to do with any compilation of figures or studies to determine whether the armored car service or off-premises receptacle or depository at Plant City Plaza is operated at a profit or a loss by the bank? A. No.

Q. You don't recall any occasion where you've been called upon to compile figures for that purpose? A. No.

Q. If this were done in the banking operations within your organization, who would do it? Would it be the cashier or— A. I don't know.

Q. Do you know whether the bank's deposit slips are ever used in connection with the armored car service or the receptacle or depository at the Plant City Plaza instead of the messenger transmittal slips? A. No.

Q. At the time you receive the document, you don't really know its origin? It could have been something made out in the bank, it could have been something made out at the off-premises depository, and you wouldn't have any way of knowing it. You just see the pieces of paper, is that correct? A. That's right.

Q. Are you familiar with the card which is called the Comprehensive Dual Control card that's used by the bank? A. No.

Q. Are you familiar with any books of messenger transmittal slips which are prepared by the bank for its customer's use? A. No.

Q. By books I mean something—the transmittal slips are made up in a little book, rather like coupons, where a person would tear one out when he's ready to fill out a slip. That's what I'm talking about. A. You mean like a deposit slip?

Q. Or what the bank calls a messenger transmittal slip? A. No.

Q. Have you attended any meetings of the bank, of bank employees, where the mechanics of the off-premises depository or receptacle or the mechanics of the armored car service have been explained? A. The mechanics explained—I don't think so.

Q. Well, have you been at any meetings where the service has been explained? A. The service I would say.

Q. Tell me about those meetings. Where were they held and what was the purpose of them? A. Just explaining what the armored car service would be.

Q. Who explained it? A. Mr. Rickerts.

Q. And who was present? A. My goodness.

Q. If you can't remember people, just what classes of employees were present? Was it a general bank meeting? A. I think it was for all the employees, a general bank meeting.

Q. Have you personally had any occasion to solicit accounts for the bank in connection with these two facilities we're talking about? A. No, I haven't.

Q. Have you had any reason to try to explain those services to anyone? A. No, I haven't.

Q. Do you recall what you were told in this general meeting about these services? A. Not really.

Q. Do you have any recollection of anything you were told? A. That it was just a messenger service, that we would service our customers.

Q. This is all that you can recall? A. Yes.

Q. Were any agreements used in connection with it explained to you? A. I really don't remember.

Q. It is my understanding that if a customer orders money to be delivered by the armored car or if a customer sends money in through the armored car, that a bookkeeping transaction is done. We've talked about part of it where the debit is written; and I guess when the money comes in, the messenger transmittal slips comes with it and it's checked off for accuracy; and then these documents come into your department to be handled as you mentioned.

From a bookkeeping point of view, is there any difference in the way these documents are handled if they are received on Saturday than if they are received during the

week, the regular business week? A. No. I mean I do not know anything about that.

Q. Well, I understand the service is operated on Saturday when otherwise the bank's facilities aren't available to the public. Is this correct? A. Well, the bank is closed on Saturdays.

Q. Now, when does your department receive the documents which show the business transacted on Saturday? A. It would be Tuesday because they would go through the proof Monday and we would receive them Tuesday.

Q. Go through the proof Monday and go over to Tampa and come back to you Tuesday? A. That's right.

Q. Do I understand your department doesn't really come into the picture until it comes back from Tampa? A. Except the ones that are unqualified, the ones without account numbers. The girl qualifies those. Other than that, we see nothing until it comes back from Marine.

Q. Who is the person in charge of receiving the documents before they go to Marine, after the tellers have had them? A. The proof operator, Betty Mansel.

Q. Betty Manson? A. Mansel.

Q. Does she have an immediate superior, somebody who is her boss? A. I guess I'm her boss.

Q. And who is your immediate superior, the cashier? A. Would it be Charles?

MR. RICKERTS: I reckon.

A. Charles Futch.

Q. Now, what position does Mr. Pelham hold and what does he do? A. Head Teller and Assistant Cashier.

Q. But he works in a different area than you? A. Yes.

Q. Is he the person who is in charge of those who initially receive the documents of transactions, that is, the checks which come in or the debit slips which are made

up from the armored car operation, things like this; Mr. Pelham or one of the other tellers principally handles these, is this right, forwards them on back to the bookkeeping, first to Mrs. Mansel and then to you? A. I imagine so, because being head teller—well, I'm not sure.

Q. Do you know when these messenger transmittal slips come in— A. No.

Q. Excuse me—to show that somebody is sending money into the bank through the messenger service, do you know whether they are used as the deposit slip once they get to the bank or whether physically the information is taken off the messenger transmittal slip and put on a deposit slip? A. No. I do not know that.

Q. Is there a service charge made when a customer orders money to be sent by the armored car service and there is a debit and you get this yellow slip, anywhere in the bookkeeping operation, do you make a service charge for that? A. I do not file one. I've never seen one.

Q. If you were handling a check which had been cashed, you would file a service charge. A. No. The computer computes a service charge for that day at the end of the month.

Q. Well, does the computer compute a service charge on these debits? A. Which debits?

Q. The ones that are—the debit slips which are made up when a person orders money from the bank through the armored car service. A. No.

Q. You may recall that you mentioned that insofar as your department is concerned the handling of the check and the handling of these debit slips, which are made up when people order money to be delivered by the armored car, it is the same; but there would be the distinction there is a service charge made in connection with the check and there is no service charge made in connection with the debit slip. Is this correct? A. No. As far as

we're concerned that is counted as a check. Charges are counted as checks—the computer just counts them. Each thing posted is an item.

Q. Well, now, if I'm a customer of the bank and I write ten checks or twenty checks or thirty checks during a monthly period, I'm charged a service charge on the basis of the number of checks I write. Is this correct? A. Yes.

Q. Now, suppose I don't write any checks at all, but I order money thirty times in a month and thirty of these debit slips are made up at the bank. Is there a service charge made against my account? A. They're counted as a check and they would be counted as a service charge.

Q. And so if I ordered this money thirty times and there was a charge for thirty checks, I'd pay a similar charge for thirty debits? A. Not on the change accounts, because to us that's just a washout account and we don't charge a service charge on the change accounts.

Q. On what? A. On the change account, we don't charge a service charge.

Q. Let me see if I can get this straight. If I have an account in your bank and I'm writing checks from my checkbook against it; or if I'm writing counter checks at the bank against it, I am charged a service charge for the handling of those checks, is this correct? A. Yes. If you maintain a balance, though, of over $100 or higher which 10 per cent of that, you are given credit for that and if you carry enough in your account, you would not get a service charge.

Q. Right, but in any event you have to compute the number of checks that I have presented. A. Yes.

Q. During the given period of time against my checking account balance. A. Balance, yes.

Q. In order to determine whether there is a charge to be made. A. The computer does that.

Q. The computer does that. All right. Is the same thing done relative to these debits? A. Now, that—we have it set up as a change account and it's just a washout account. There's no service charge on the change accounts.

Q. What is a change account? A. Well, that's just what we have set this up under for the change that, I guess, that they order. We've set it up under a change account with the business name or customer's name underneath the change account.

Q. So all of these accounts where people order money to be delivered through the armored car service are listed in your change account? A. Yes.

Q. Are there any other accounts listed in that or is it just solely the accounts that are being served by the armored car? A. No. The change accounts are just the ones—

Q. Serviced by the armored car? A. Yes.

Q. And any debit against a change account, so to speak, there's no charge made for handling that? A. No charge, no.

Q. For handling that debit. Okay. I think I understand. You say it's a washout. What does it wash out against? A. There's a debit and a deposit. Your debit is the same amount of your deposit. One amount just washes out the other amount.

Q. There is no banking charge made for this? A. No.

Q. This is what we've been talking about? A. Yes.

Q. In terms of time, if I presented a check against my checking account at the bank, would the amount of that check be shown as a debit on my account from the bookkeeping point of view if any time before the next morning after it's gone through Mrs. Mansel's department and gone to the Marine and come back with the trial balance? A. It would show when it came back with the trial balance.

Q. This is the first time it would show? A. That's right.

Q. Now, if I ordered money to be delivered by the armored car, when is the first time that that order is shown against my account, the next morning? A. When would you order it?

Q. Suppose I ordered by telephone on Monday night and on Tuesday morning the order is received by the persons in charge of that operation and they make up a debit slip for the order and it's processed to Mrs. Mansel, sent to the Marine Bank and comes back the next day with the trial balance. A. Wednesday morning.

Q. Wednesday morning it would show up and it shows up at the same time as it would if I had drawn the money out by check? A. On the same day.

Q. On the same day? A. Yes.

Q. Do you know of any instances in which a deposit has been tendered through the armored car messenger service and it has been refused because the amount of money tendered wasn't the same as shown on the messenger transmittal slip? A. No.

Q. Do you know of any instance where there's been an order for money by a customer to be delivered through the armored car service and the customer had an insufficient balance to cover it? A. No, I do not.

Q. Do you know the procedures which the bank follows to prevent that from happening? A. No.

Q. Is your change account set up on one long sheet of paper with the customer's name on it, or is there a separate card for each customer? A. Separate little divider where we file the checks. We file by signature. We have a divider for each account with their name on it.

Q. And it's all in a large drawer or drawers? A. Drawers.

Q. And if I wanted to determine how many people were using that service in calling in for money, for change, one of the ways to do it would be to have access to the drawers and see the various numbers of accounts in it, is this right? A. Well, yes, and they're also listed on the trial balance every day.

Q. Is that one sheet of paper? A. It's a book.

Q. A book? A. Yes.

Q. Suppose instead of ordering change to be delivered, I was ordering payrolls. Would this also be handled through this change account? A. I do not know.

Q. If, for example, I were not John Doe the shoe store man who wanted $25; but if I were Lykes Brothers who wanted $10,000 on a given day to make a payroll, would the two orders for money be handled the same way? A. I wouldn't know about that.

Q. Do you know, from your bookkeeping point of view, whether there are large orders for money going through the change account? A. No, because—well, I don't file these every day and, really, we file more or less by signature and account numbers and we don't look at the amounts.

MR. SMITH: I have no other questions.

MR. EDWARDS: No questions.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

ORDER ON ALL MOTIONS FILED TO DATE —FILED APRIL 17, 1967

The above cause having come on to be heard upon the motions, objections to Interrogatories and opposition to Motions to Produce hereinafter recited set for hearing

pursuant to order of this court entered on the 27th day of February, 1967, and counsel for all parties being present and heard and the Court, after considering the matters as presented and having considered all argument of counsel and being otherwise advised in the premises, does hereby order:

1. That the Motion of the intervening banks to produce dated March 16, 1967, and Supplemental Motion to Produce filed by the intervening banks dated March 17, 1967, directed to Plaintiff, THE FIRST NATIONAL BANK IN PLANT CITY, is denied as to Items 2, 3, 4, 5, 6, 8 and 9 of the Motion to Produce and Items 2, 3 and 4 of the Supplemental Motion to Produce.

2. The Plaintiff, THE FIRST NATIONAL BANK IN PLANT CITY, is hereby directed to produce for the intervening defendant banks inspection and copying or photographing information requested by Paragraphs 1 and 7 of intervening defendants motion to produce and paragraph 1 of intervening defendants Supplemental Motion to Produce not later than Thursday, April 20, 1967, at the business premises of the Plaintiff.

3. That the Motion for Order that deposition of WILLIAM B. CAMP, Comptroller of the Currency of the United States not be taken is hereby granted and it is hereby held that said WILLIAM B. CAMP, Comptroller of the Currency of the United States is not subject to a deposition upon oral examination, absent a showing of personal involvement and absent specific order of court granting same.

4. That the Motion to Strike the affidavit of WILLIAM B. CAMP, Comptroller of the Currency of the United States filed by the intervening defendant banks filed April 10, 1967, be and the same is hereby denied.

5. That the objections to Interrogatories filed by the Intervening Plaintiff, Comptroller of the Currency, di-

rected to Interrogatories and Supplemental Interrogatories filed by the intervening defendant banks are sustained as to Interrogatories No. 5 (e), 6, 9, 12 (b), 16(a) through 16(c), 17, 20, 21(b) and (c) and Supplemental Interrogatory No. 23 also designated as No. 1 in Supplemental Interrogatories.

6. Consideration of Interrogatories No. 2 and 4 as propounded by the intervening defendant banks and the objections interposed thereto by the intervening Comptroller of the Currency is hereby postponed to a future date and pending consideration of the issues raised under 12 U.S.C., Section 24 (7).

7. Interrogatory No. 18 propounded by the intervening defendant banks to the Comptroller of the Currency is hereby withdrawn by verbal motion of counsel for intervening banks.

8. The motion of intervening defendant banks to compel attendance at deposition of WILLIAM B. CAMP, Comptroller of the Currency of the United States is denied.

9. The motion of intervening defendant banks to strike the last two full paragraphs of Section B and Exhibit A of the memorandum filed by the intervening plaintiff, Comptroller of the Currency, is hereby denied.

10. The motion to produce filed by the intervening defendant banks directed to the intervening plaintiff, Comptroller of the Currency, dated March 16, 1967, the Supplemental Motion to Produce dated March 24, 1967, and Supplemental Motion to Produce No. 2 dated March 30, 1967, be and they are each severally denied. The intervening Comptroller of the Currency is by these presents directed to furnish to the intervening defendant banks' counsel of record not later than Thursday, April 20, 1967, all rulings and correspondence maintained by the Comptroller of the Currency in his "precedence files" with respect to the applicability of 12 U.S.C. Sections

36 and 81 to (a) an independent carrier operating an armored car service for or in behalf of a national bank or its customers; (b) the operation of an armored car service by a national bank; (c) the operation of an off-premise receptacle or depository for currency, checks and other similar banking items. Provided, however, the Comptroller of the Currency shall be authorized to eliminate the names and addresses of any bank mentioned in the rulings and correspondence produced pursuant to this order.

DONE AND ORDERED in Chambers at Tallahassee this 17th day of April, 1967.

/s/ G. Harrold Carswell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

PRE-TRIAL ORDER—FILED APRIL 17, 1967

This cause came on for pre-trial conference in accordance with Federal Rules of Civil Procedure pursuant to notice, and counsel for all parties were present and heard. It is, upon consideration, hereby

ORDERED:

1. Stipulation of counsel was entered herein on March 30, 1967 which makes some basic changes in schedule established by order of the Court dated February 27, 1967. This stipulation of counsel is expressly approved by the Court and modifies the order of the Court dated February 27, 1967.

2. Hearing previously scheduled for April 25, 1967 will be limited to consideration of plaintiff's and intervening United States Comptroller's separate motions for

summary judgment insofar as they are directed to Section 36 and/or Section 81 and concerning the authority of the State Comptroller. Matters with reference to Section 24 shall not be heard or considered at this particular hearing and all discovery relevant to Section 24 is hereby postponed pending determination of the motions for summary judgment to be heard April 25, 1967.

3. Intervening bank's motion to strike certain portions of affidavit of the President of the Plant City bank filed in support of plaintiff's motion for summary judgment are ruled upon as follows:

a. That portion of the affidavit reading ". . . so that they might safely reach the bank . . ." and words following is granted to the extent that they shall only be considered by the Court as a general statement of the Plant City bank's motivation.

b. That portion of the affidavit making general reference to the effect that all customers received an explanation will be considered by the Court only as a general statement of instruction to employees of the bank to make such explanation.

c. Paragraph 3 of the affidavit referring to Exhibit C will be considered only to the extent that it refers to Exhibit C as agreement between the bank and its customers. The other portions of this particular paragraph are considered by the Court to be interpretive and conclusionary and will not be considered.

d. The portion of the affidavit referring to certain fines will be stricken but without prejudice to the plaintiff to develop by deposition or otherwise, if not already on the record, the fact of the existence of signs, and legend and location.

e. That portion of paragraph 5 of the affidavit referring to authority of Mr. Schwinn will be considered only

as authority from a public official but is not considered by the Court as dispositive of the legal effect.

f. Motion to strike paragraph 7 is granted as irrelevant on 36-81 issues.

4. Motion of intervening bank to enlarge time served March 20, 1967 be and it is hereby granted, the same being consistent with the stipulation of counsel previously referred to.

5. On intervening bank's motion to strike certain portion of Camp's affidavit:

a. Paragraph 3 will only be considered insofar as the exhibit is concerned, the other portions relating to Section 24 issues.

b. Paragraph 4—motion to strike will be denied, the statement will be considered by the Court only as an official statement of the Comptroller of the Currency with respect to policy.

All remaining portions of Comptroller Camp's affidavit relate to Section 24 matters and will not be considered at hearing April 25, 1967. Motions to strike those portions will be held in abeyance in accordance with the foregoing.

6. Objections of the Plant City bank to the intervening bank's interrogatories dated March 16, 1967 (Nos. 1, 2 and 3), and supplemental interrogatories dated March 18, 1967 (No. 1):

The motions are sustained, the Court concluding that it is incumbent upon plaintiff to establish substantial, but only substantial, actual operation in accordance with the theory of the operation. To meet the thrust of these interrogatories it is, therefore, ordered that plaintiff shall provide opposing counsel with the following information

within three (3) days of the date of this order: The total number of customer-users of subject service; and the names and addresses of at least 10% of said customer-users.

DONE AND ORDERED in Chambers at Tallahassee this 17th day of April 1967.

/s/ G. Harrold Carswell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF HARLEY WHITE
—FILED APRIL 24, 1967

• • •

Deposition of HARLEY WHITE, taken pursuant to notice this 19th day of April, 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at 107 South Evers Street, Plant City, Florida, beginning at the hour of 3:10 o'clock P.M.

Thereupon the said

HARLEY WHITE,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Would you state your full name, please, sir? A. Harley Edward White, Jr.

Q. What is your residential address? A. 913 South Boulevard in Lakeland, Florida.

Q. What is your business or occupation? A. My occupation is manager of Eckerd's in Plant City, Incorporated.

Q. What is your age? A. Twenty-five.

Q. How long have you been associated with Eckerd's? A. Going on four years.

Q. Have you been employed by Eckerd's in any stores other than the one here in Plant City? A. Yes, I have.

Q. What other stores have you been employed at? A. Grove Park Eckerd's No. 14. Southeast Plaza Eckerd's No. 22.

Q. Excuse me. Where is No. 14? A. In Lakeland. Grove Park in Lakeland. No. 22 is Southeast Plaza in Winter Haven, Florida. No. 40, which is Eckerd's of Avenue K, Incorporated, in Winter Haven. The store at Searstown.

Q. Is that also in Lakeland? A. Right, and the one on Wabash Avenue in Lakeland.

Q. How long have you been associated with the Eckerd store here in Plant City? A. Since December 1st.

Q. 1966? A. Yes.

Q. And that store is located at Plant City Plaza south of town here? A. Right, on South Collins.

Q. Does Eckerd's maintain an account or accounts with the First National Bank in Plant City? A. Yes.

Q. Are you familiar with the accounts? A. In what respect?

Q. Well, do you know how many they are and what their identifications are? A. No, I do not. Other than I know we do maintain an account and there is money present; but as to what type, I do not know.

Q. You don't know whether there is one or more account? A. I know there is at least one. I don't know if there's more than one or not.

Q. The one that you do know about, do you know what kind of account it is? Do you know if it's a regular checking account? A. I don't know exactly what classification

this is. As far as I know it's a checking account, because checks are written.

Q. Do you have authority to write checks on it? A. No, I do not.

Q. Does that authority rest with the comptroller or other officers of the corporation in Clearwater? A. The comptroller.

Q. And what date did you actually take over as store manager at Plant City Plaza? A. December 24th.

Q. At the time that you took over, was Eckerd's making use either of the receptacle or depository operated by the First National at Plant City Plaza or the armored car? A. Both.

Q. Is Eckerd's now using both? A. That is correct.

Q. In connection with the receptacle or depository at Plant City Plaza, do you have furnished to you a canvas locked bag or a canvas bag with a lock? A. In fact, we have five of them.

Q. Five. Do you have furnished to you a key to the depository or receptacle there at Plant City Plaza? A. There and the bank also.

Q. And at the bank you mean for the night?— A. Night depository at the bank.

Q. —the night depository at the bank? A. Yes, sir.

Q. Do you know, of your own knowledge, whether Eckerd's paid anything either for the bag or the key? A. No. There is no charge for either the bag or the key.

Q. Does Eckerd's place its receipts in the facility which is maintained at Plant City Plaza? A. Yes, under normal circumstances.

Q. Would you explain the usual routine which is followed? A. You mean for a deposit?

Q. Yes. A. In other words, our regular checkout procedure, we use—we check each register and we bal-

ance these registers and each separate—each deposit from each of these registers are placed in separate envelopes and then placed into the locked bag.

Q. Are these envelopes which the bank provides or ones which you provide? A. The bank provides it most of the time unless we happen to run out and forget to call them.

Q. Are they envelopes like this green envelope I'm holding in my hand? A. Yes, they are.

Q. Do you also use, in connection with your deposits, a slip similar to the one which is before you which we call Exhibit B to Mr. Rickert's affidavit? A. It is a transmittal slip. In other words, they have a deposit slip in the envelope and then the transmittal slip with the bag, the locked bag.

Q. All right. Now, do you put the transmittal slip in each envelope? A. No.

Q. Or do you put a regular deposit slip in each envelope? A. A regular deposit slip broken down by checks, coins and currency.

Q. I show you a copy of a slip here and ask you is that like the regular deposit slip which you use except, of course, that this one has on the side of it "Fremac's". A. It's not in the same order if that's what—

Q. Pardon me? A. It's not in this order. Ours are made more similar to this right here.

Q. More similar to the messenger transmittal slips? A. Yes.

Q. Just so we're clear on it, it is, in fact, a regular deposit slip? A. Oh, yes.

Q. And then on the outside of the bag you attach one of these messenger tansmittal slips? A. Yes.

Q. Do you include one of these messenger transmittal slips inside the bag as well or just attach it to the out-

side? A. Our procedure—sometimes we forget these things just like anything else. What we usually do is we put the bag into a green paper bag from the store and put it in with that and drop it in the depository.

Q. You put the paper bag in too? A. We put the green bag inside the paper bag, the slip in with it and drop the whole thing into the receptacle.

Q. In other words, you take the green canvas bag which contains your receipts. A. Yes, and the deposit slips.

Q. And you put it in a green paper bag? A. Right.

Q. Which is just a bag from your store, I take it. A. Right.

Q. And you also include one of these transmittal slips showing the total amount of the contents. A. Showing the total amount of deposits, yes.

Q. And do you simply put the transmittal slip loose in the green bag or in the paper bag or do you actually attach it to the green canvas bag? A. Just loose.

Q. Do you keep a copy of the messenger transmittal slip that you send with your deposits? A. We keep them for a couple of days usually a day or two.

Q. Do you keep a copy of the regular deposit slips which are placed in each envelope? A. Yes. Those are sent to our office in Clearwater. In other words, when we make up a deposit slip on a deposit, we make three copies. We sent the top and the bottom copy to the bank with the deposit and the second copy we attach with our readings from the registers, over rings and so forth that have accumulated during the day; and this complete package for each register goes into our Clearwater office.

Q. Now, after you have made a deposit, say on a Monday, by dropping your bag or bags into the facility there, do you get anything back from the bank with a stamp on it? A. We get an amount—in other words, the

slip we send in with it, we'll get a slip showing that that amount was deposited.

Q. Well, do you actually get your messenger transmittal slip back itself? A. Most of the time they send those back in the green—in the locked bags. I'm trying to think because the past couple of days I haven't pulled them out of the green bags, but normal circumstances we get them back in the green bags.

Q. You get the messenger transmittal slip back in the green bag? A. Yes.

Q. Do you also get your deposit slips, your regular deposit slips back in the green bag? A. No. Those are mailed directly to Clearwater.

Q. And what do you do with the messenger transmittal slip that you get back? A. We don't have any place to send them—we hold them—in other words, if they balance out with what we send in, we may hold them a day or two and then—

Q. Throw them away? A. Throw them away.

Q. What is sent to your main office in Clearwater? A. A copy of the deposit, of each slip.

Q. In other words, a copy of the regular deposit slip is sent over? A. Yes, right.

Q. And that isn't done by you, but is done directly by the bank? A. That's true.

Q. Now, do you also have occasion to have monies delivered to the store from the bank? A. In the form of change, yes.

Q. How do you place orders for that money? A. Usually on the phone to the Head Teller or at times if he's out, one of the other tellers.

Q. The Head Teller is Mr. Leon Pelham? A. Yes.

Q. And do you usually make the calls or is that somebody else's duty? A. Usually I or my assistant one. In fact, we're the only ones that do make the calls.

Q. I understand the bank has a system where they record messages and another system where you can actually phone the bank. Which one do you use? A. We call directly to them.

Q. You call directly to the bank? A. We've had one occasion where we used the recording.

Q. Do you ever send any orders for change to the bank, either by Mr. Meriwether or by putting a note inside of your canvas bag? A. We have on a couple of occasions ordered it when Mr. Meriwether came out by giving him written—in other words, write down the exact denominations of change that we wanted and sign a slip he takes with him.

Q. On those occasions did you give Mr. Meriwether any money? A. No.

Q. Under your normal procedures where you call in, they make up your order and then, as I understand it, that's delivered to you by the armored car and Mr. Meriwether brings it in to you? A. That is true.

Q. What happens then? A. In other words, he brings in a field bag with a tag on the outside with the amount of change that is in this bag. He brings in a transmittal slip and a debit form which debits our account for that amount of money and then we give him whatever it happens to be. If it's $200, let's say, for instance, then we give him a debit slip in one of these little green envelopes with the amount on the outside.

Q. So normally at the time that the money which you have ordered is delivered to you, you sign the debit slip upon the delivery of the money and then you give Mr. Meriwether an equivalent amount of money, an amount of money equivalent to the change you receive which you put in a green envelope with a transmittal slip? A. And a deposit slip.

Q. And a deposit slip? A. To be deposited back to our account.

Q. And, then, are these deposit slips handled the same way; that is, the regular deposit slip is mailed directly to your Clearwater office and the regular transmittal slip is sent back to you? A. You got me. I got to stop and think. The deposit slips are not mailed in. We maintain them in the store. In other words, the Clearwater office has no use for them, so we don't send those in; and the best that I can remember, I don't remember seeing a transmittal slip on there. I mean, a validation of the deposit.

Q. If I understand you correctly, what you're saying is that when you send in your $200 for the $200 in change that you send to them a deposit slip and a transmittal slip as well. A. Right.

Q. That you get back from them a deposit slip which has been validated with a stamp on it and you also get back the transmittal slip which is not validated. Is this right? A. No. We don't get a copy of the transmittal slip back.

Q. You don't get the transmittal slip back at all? A. No.

Q. But you do get the deposit slip back? A. The best I can remember, we do get a copy of the deposit slip back on that amount of money.

Q. How do you account for the $200 which you give Mr. Meriwether for change? How do you account for that to your superiors? A. How do I account for it?

Q. Yes. This is what I'm struggling with. Suppose in a given day your receipts are $1,000 and the same day you want $200 worth of change. So when the change is delivered, you give to the bank $200. A. Well, now, I maintain—

Q. And then you put $800 at the end of the day in the deposit and the remainder is cash you have on hand in the store for operation. Is this true? A. In other

words, I maintain in the store for store operation a given amount of money; and at the time he comes out, I take the $200 or whatever the amount of change is out of this money that I have for operation.

Q. I see. A. And give it to him.

Q. So you have on hand, then, at all times, for the purpose of your company audits an amount of money in the store either in change or other funds which you have in hand. A. Right.

Q. I want to show you a document here which we call Exhibit C in connection with Mr. Rickerts' affidavit. Have you ever seen a document like that before? A. Yes, I have.

Q. Is that the document which is signed at the time the money is delivered to you? A. Yes.

Q. Who signs it? A. Usually I or my assistant one.

Q. Did either you or your assistant, to your knowledge, sign this Exhibit A?

MR. EDWARDS: I object to the question.

BY MR. SMITH:

Q. Sign a document like Exhibit A? A. As best I can remember, I have signed a contract of this nature.

Q. You have? A. To the best of my knowledge. As I say, when I first took over, I signed quite a few documents and to the best of my knowledge, I did sign a form of this nature.

Q. Do you have a specific recollection about that or you just think you did? A. Like I say, as best I can remember. I'm almost certain that I have signed one.

Q. But you're not positive? A. I wouldn't swear to it on a stack of Bibles.

Q. Well, you realize you are swearing here— A. I realize that.

Q. —on a stack of Bibles. A. You asked me if I had and as I say, I'm almost certain that I have. The only way I could be sure was if the form was—

Q. All right. Do you know if your assistant has signed one? A. In fact, I'm almost certain he signed the one I did.

Q. In fact, his name is White, also? A. There's two signatures. Dean White and this is Harley White.

Q. Do you recall ever having received from the First National Bank a questionnaire pertaining to the bank service on which it asked what days you want messenger service and things like that? A. Not to my knowledge or not that I can remember.

Q. Do you have authority to write checks against your company account? A. No, I do not.

Q. This document which we've identified as Exhibit C reads "Your account has been charged for the total shown hereon representing monies requisitioned for delivery to you by bank's messenger," and as I understand it, you signed this? A. Yes.

Q. What account are you referring to that has been charged? A. That I can't give you an answer on.

Q. Could you tell me, of your own knowledge, whether, in fact, any account is actually charged? A. From my own personal knowledge, no.

Q. Could you say, of your own personal knowledge, whether Eckerd's uses an armored car service in other cities to deliver money from its stores to the banks it uses? A. Yes. We use other armored services.

Q. Could you give me the names of any others that are used? A. The one in Winter Haven uses Security Transport. That's at Avenue K; and the one at Searstown uses Brinks.

MR. SMITH: I have no other questions.

Examination by Mr. Edwards

Q. Mr. White, when you order monies, they are brought to you there in a locked bag, is that right? A. Sealed as the standard type clamping that Brinks and all of them uses. In other words, it's a cord-type binding with a lead covering that flips over the cord and you clamp it shut so that it can't be opened.

Q. Can't be tampered? A. Can't be tampered with, and then a tag is placed on the outside of it with the amount of money included in the bag.

Q. And this is brought to whoever is authorized in the store to receipt for it? A. Either my assistant or myself.

Q. Now, do you usually send a deposit back at that time? A. Yes, we do.

Q. What is in this deposit, cash money? A. Cash, yes.

Q. And you enclose that in a green envelope which was talked about earlier? A. Yes.

MR. SMITH: I think we ought to have this marked.

MR. EDWARDS: At this time we'll ask that this be marked as Plaintiff's Exhibit 1 in this deposition.

(Whereupon, Plaintiff's Exhibit 1 was marked for identification.)

(Whereupon, a discussion followed off the record.)

MR. EDWARDS: The record will show that Plaintiff's Exhibit 1 is a green envelope identified as the First National Bank in Plant City 24-hour Bank Messenger Service with other pertinent information thereon.

MR. SMITH: And we further are in agreement that this is the same green envelope referred to by the witness Mary Davis in her deposition.

MR. EDWARDS: It is so stipulated.

By MR. EDWARDS:

Q. Mr. White, when funds are transmitted to the bank from your place of business, when does your company get credit, to your knowledge? A. In other words, my deposits are sent in—well, let's take, for instance, Monday we make a deposit. Then the deposit slips that we send to our office are sent in that night and judging from—in other words, reports have to be made up weekly and I know they get them within—usually within a day or two in Clearwater, because if they don't get them within a day or two, they call me.

Q. Do you know when your funds are credited to your account in the bank? A. To the best of my knowledge when the deposits are checked in at the bank.

Q. In the event or have you ever had occasion to have a shortage where there was less money in the bank than was included on the transmittal slip? A. You say less?

Q. Yes. A. Not to my knowledge.

MR. EDWARDS: I have no further questions.

THE WITNESS: I can give you the company's—the way we would handle it should something like this occur.

MR. EDWARDS: It's not material to this if it hasn't happened.

Examination by Mr. Smith

Q. You mentioned, sir, when you thought that the bank got credit for the monies which are sent down there. Do you know that as your own personal knowledge? A. No, I don't.

Q. And you said that deposit slips are sent in to Clearwater. As I understand it, Clearwater is where your headquarters are, is that right? A. Yes.

Q. And the deposit slips are sent in to Clearwater on the same day that you send your deposit down to the bank? A. That's true.

Q. Now, there you are talking about regular deposit slips, aren't you, not the transmittal slips? A. Right. In other words, the deposit slips that are in each of the envelopes in the locked bag.

Q. And the deposit slips which you put in the green envelopes, when you are putting the money into the receptacle or depository, are actually regular deposit slips? A. Yes.

Q. I show you the green envelope which is Plaintiff's Exhibit 1, has been identified as Plaintiff's Exhibit 1. It has directions on it. Do you see those? A. Yes.

Q. Number 6 says: "The funds in this envelope are accepted in accordance with the contract printed on the reverse of the messenger transmittal slip." Actually, you don't put a messenger transmittal slip inside the envelope, do you? A. No.

Q. And Number 4 says: "Endorsed checks. Enclosed checks and/or cash with transmittal slip in this envelope." That isn't the procedure which you follow, is it? A. Not on each of these envelopes, no, sir.

MR. SMITH: All right, sir. I have no other questions.

Examination by Mr. Edwards

Q. Well, you do put a transmittal slip on each— A. Complete deposit.

Q. As it is transmitted to the bank? A. Yes.

Q. And why do you do that? A. To comply with the—

MR. SMITH: Excuse me. Are you asking him a legal question?

MR. EDWARDS: I'm asking him why he does it. He must have some reason for it.

A. As I understand it, this, as it was explained to me, that these transmittal slips were utilized—in other

words, the messenger was acting on our behalf transmitting funds to and from us to the bank and that was the reason for the transmittal slips.

Q. As a matter of fact, is this printed on the slip which you use, the transmittal slip? A. That the messenger is working in our behalf in taking the funds to and from?

Q. Yes. A. I'm pretty sure it is.

Q. I showed you Exhibit B which is attached to Mr. Rickerts' affidavit in support of the summary judgment and ask you if the wording contained here under the term contract on Exhibit B is the wording that's contained on your transmittal slips? A. To the best of my recollection.

Q. And does this fairly represent the agreement that you understand to exist between you and the bank? A. As it was explained to me by the previous manager at the store and also by the bank, it is.

MR. EDWARDS: No further questions.

Examination by Mr. Smith

Q. This slip to which Mr. Edwards referred is the one that's put in the paper bag along with the canvas bag? A. Yes, sir, and we also get—

Q. And it's the one that's put in the green envelope when you're giving cash in exchange for change delivered? A. Yes.

Q. Are you authorized by Eckerd's to execute contracts which bind that company? A. To execute contracts—

MR. EDWARDS: I object to the question on the basis that it calls for a conclusion, a legal conclusion on the part of the witness. He's not competent to testify whether he's authorized to bind the company.

By MR. SMITH:

Q. Do you know, sir, whether you're authorized to execute contracts in behalf of Eckerd's? A. When you're

talking about contracts—in other words, I don't think I can give you a correct answer or a truthful answer based on what you've asked me.

Q. Well, so far as you can remember, in your experience working with Eckerd's, have you ever signed a contract in behalf of the Company? A. There are circumstances when my signature is the only thing that's needed on the contract. In other words, I was trying to think of an example to see if this is what you were talking about. I can't give you—I can't give you a statement one way or the other. In other words, for instance, if what you're referring to is a contract between my store and the bank, this is handled—in other words, the arrangements and so forth are made up by the comptroller and then he authorizes the store manager to sign forms or anything going to and from.

Q. Well, you were trying to think of an instance in which you had executed a contract in behalf of Eckerd's. Can you think of any? A. That's kind of hard to do right off the bat. Not right off-hand I can't think of any.

Q. Do you go through a training course when you get ready to go to work for Eckerd's? A. I've gone through about four years of it.

Q. Do you get any instructions in the training course about signing things? A. In other words—well, in other words, we know what we can do and what we can't do in most all circumstances. Should a case come up that we're not familiar with, we have people in Clearwater.

Q. Have you ever been advised in your training course that you were or were not authorized to sign contracts in behalf of Eckerd's? A. It's only one time it's ever come up and it's something they were going to do chain-wide.

Q. Something what? A. It was a contract or an agreement actually between Grants and Eckerd's.

Q. Who signed it? A. I did.

Q. Were you given express authority to sign that one? A. I was given the authority at that time but it was given by the wrong person, so it wound up being nullified, but it was an agreement between Grants and ourselves.

Q. And in that instance your signature was not honored but the agreement was nullified. Is this correct? A. Right.

Q. You said you were authorized to sign forms with banks. How did you get that authority? A. What I was referring to—in other words, each deposit slip that goes in has to have our signature—either my assistant's or myself signature on the deposit slip as they go in and this is more than likely for our home office.

Q. This is what? A. This is for our home office, as far as I know.

Q. Yes. A. But other than that, as far as ordering change or anything, it's supposed to be—in other words, it's up to us to maintain our own change and our own deposits.

Q. Well, you haven't gotten any explicit written authority from Eckerd's authorizing you to sign anything, have you? A. No.

MR. SMITH: I have no other questions.

Examination by Mr. Edwards

Q. Mr. White, who is in charge of the business out there at Eckerd's? A. In charge of the operation?

Q. Yes. A. I am.

Q. Who makes the day-to-day business decisions? A. I do.

Q. In your position as manager of the store, are you called on to make decisions as to what that business is to do and not to do? A. On occasions, yes.

Q. Who else has that authority? A. My assistant. In other words, he's actually working under me in the form of training.

Q. But you are in charge of this store? A. Yes.

MR. EDWARDS: I have no further questions.

Examination by Mr. Smith

Q. When you say that you make decisions on what to do and not to do on a daily basis, you don't decide what sort of goods go in the store, do you? A. In some instances, yes.

Q. Well, doesn't your store, however, do central purchasing for commodities, the Eckerd's chain does? A. On some items, yes, but not on all.

Q. And doesn't your store send out all of the time materials about display of materials, how to display them? A. On some items, yes, not on all.

Q. Well, in order to shorten this up, would you be willing to agree that your authority to decide what to do and not to do on a daily basis is limited to the policies of the company? You have to act within the policies of the company.

MR. EDWARDS: I object to that question. It calls for a conclusion on the one hand and an agreement on the other. I don't think the way the question is phrased you can elicit any fact.

MR. SMITH: I'm only asking him isn't the range of his decision limited to the overall company policies under the direction from his supervisors.

A. Did you ever feel like a football?

Let's put it this way: I am charged with the operation of the store. I, as anyone else, has guides and standard procedures on gauging my transactions in my business, as

anyone does. I do have authority to buy items that I want to place in my store from any number of different sources. I can either buy or not buy and unless it's— sometimes the office wants to put in an item, fine. If I don't want it, I don't have to carry it. So, most of it is left to my discretion whether or not I want to stock an item, whether or not I want to sell an item and so forth.

I do have gauges and so forth that I have to go by to regulate some of these activities.

MR. SMITH: All right, sir. No other questions.

MR. EDWARDS: No other questions.

MR. SMITH: Mr. White, you have a right to read and sign this deposition after it is transcribed. If you wish to do so, the purpose is to correct any errors the Reporter might have made. You may, in the alternative, waive the reading and signing of it and we would like to know now whether you'd be willing to waive the reading and signing.

If you would like to consult with Mr. Edwards, feel free to do so.

(Whereupon, a discussion followed off the record.)

THE WITNESS: I'll waive it.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF JESSIE LEON PELHAM —FILED APRIL 24, 1967

* * *

Deposition of JESSIE LEON PELHAM, taken pursuant to notice this 19th day of April, 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at 107 South Evers Street, Plant City, Florida, beginning at the hour of 9:00 o'clock A.M.

Thereupon, the said

JESSIE LEON PELHAM,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Will you state your full name, please, sir? A. Jessie Leon Pelham.

Q. Where do you live, Mr. Pelham? A. Route 1, Box 312, Lithia, Florida.

Q. What is your age? A. Thirty-eight.

Q. What is your present occupation? A. Assistant Cashier, First National Bank, Plant City.

Q. How long have you been employed by the First National Bank? A. About seven years and two months.

Q. And how long have you held the position of Assistant Cashier? A. Approximately four years. I don't remember the exact date.

Q. Who is the Cashier? A. Mr. Charles Futch, Jr.

Q. Does the bank have a Head Teller? A. Yes, sir.

Q. Who is the Head Teller? A. I am.

Q. Are you familiar with the facilities or services which the First National Bank renders in Plant City commonly called the off-premises receptacle or depository at Plant City Plaza and the armored car service? A. Yes, sir, I am familiar with the receptacle.

Q. And you know there is also an armored car service operating? A. Yes, sir.

Q. Were you Assistant Cashier and Head Teller at the time those services were inaugurated in October, 1966? A. Yes, sir.

Q. I would like to break down these services a little bit and ask you some specific questions; and first I would like to start with those customers of the bank who are located at Plant City Plaza and who make use of the night —of the off-premises receptacle or depository.

Referring to that operation only, now, can you describe for me the kind of documents which are signed by persons who use that facility? A. We have them sign the Comprehensive Dual Control Contract.

Q. Just so I'm sure what you're talking about, I show you a copy of an exhibit attached to the affidavit of Mr. Rickerts which was filed in support of a motion for summary judgment and attached to that affidavit as Exhibit A was a document called Comprehensive Dual Control Contract. Is that the document to which you refer? A. Yes, sir.

Q. Now, in addition to signing that document, what other documents are used by those persons in the course of making use of the facilities and services? A. We have the transmittal slips which they use and also the charge advice.

Q. The charge advice, is that what you said? A. Yes, sir.

Q. Once again, for purposes of identification, I show you an exhibit attached to the same Rickerts' affidavit as Exhibit B and ask you is that a copy of the transmittal slip to which you refer? A. Yes, sir.

Q. And I show you Exhibit C attached to the same affidavit and ask you is that the document to which you refer as the charge advice? A. Yes, sir.

Q. Now, are there any other written contracts or documents used by the Plant City Plaza customers other than those that you've identified you know of? A. None that I know of.

Q. It is my understanding that these procedures are followed: That the bank will have a customer at Plant City Plaza; that this customer, if he desires to use the depository or receptacle at the Plant City Plaza, first signs this Comprehensive Dual Control Contract; that the customer is then given a canvas bag with a lock on it and a key giving access to the receptacle or depository; that from time to time the customer will put his money and checks and cash items into the canvas bag and drop it into the receptacle or depository together with one of these transmittal slips which we have just identified; and the bank's armored car will pick up the canvas bag and deliver it from the depository or receptacle to the bank's premises on Haines Street. Is this correct? A. Yes, sir.

Q. Tell me what happens when these bags arrive on the premises. A. Well, the messenger brings them into the bank after he takes them from the vault on the truck; and at that time they're opened and processed by the tellers in the bank.

Q. Now, what do you mean by processed? A. They are worked up, verified as to accuracy of the contents of the bag.

Q. In other words, the teller who is handling that particular bag will take the padlock off or it will have been

taken off, take the contents out, compare the contents with the transmittal slip which is present along with the bag and see if the information shown on the transmittal slip is consistent with the contents of the bag. Is that right? A. Yes, sir. That's the same procedure we use on any bag.

Q. Yes, and after you're checked and verified the contents, so to speak, what is done next? A. It is put in with the proof work to be processed and posted to the accounts.

Q. Is the transmittal slip the document which is used in this connection or are other papers made up? A. It becomes a deposit slip at that point.

Q. Is there a regular deposit slip written up or do you just use the transmittal slip? A. The same slip, the transmittal slip.

Q. And it goes through the bookkeeping department or through the bookkeeping process which you use, the total amount of cash and checks which has been transmitted is posted to the account of the customer. Is this correct? A. Yes, sir.

Q. And when I took Mr. Meriwether's deposition he referred to validating the transmittal slip. Is that a term which is customarily used at the bank? A. Validating or stamping initially.

Q. Is this done at the time you check the contents to be sure that they are the same as is reflected on the transmittal slip? A. Yes, sir.

Q. Now, I want to talk a minute about those persons who might—who are customers of the bank who might put cash or checks in an envelope and drop them into the off-premises receptacle or depository at Plant City Plaza. It is my understanding that green envelopes are provided out there and that a customer of the bank who has an account at the bank can take the green envelope, complete the information on the outside of it, put cash or checks in the envelope together with a transmittal slip, seal it and

drop it into the off-premises receptacle or depository. Is this correct? Is that the procedure? A. Yes, sir.

Q. And—well, is there anything else done that I've left out? A. No.

Q. That you know of up to that point? A. No, sir, not that I can think of right—

Q. Do I correctly describe the procedure? A. Yes, sir.

Q. And I understand then that the envelope is picked up by the armored car service and taken to the bank. When it gets to the bank, what happens to the envelope? A. It is processed in the same manner as any other deposit.

Q. Do the persons using the green envelopes, before they start dropping things into the receptacle or depository, sign a Comprehensive Dual Control Contract? A. No, sir.

Q. Do they give any written authority to the bank, so far as you know, to authorize opening the envelope? A. None other than stated on the envelope.

Q. All right, and, then, once the envelopes are opened and the contents verified, the transmittal slip is again sent to your bookkeeping department for processing and posting to the account of the customer. Is this correct? A. Yes, sir, and a copy mailed back to the customer.

Q. A copy mailed to the customer. Also, a copy is mailed back to those who use the bags as well, is it not? A. As a general rule, unless otherwise specified, they are put back in the bag and delivered with the bag.

Q. Now, I want to refer to those customers of the bank who send money to the bank or checks by the armored car service but do not use the Plant City Plaza facility. Are those persons furnished either envelopes or canvas bags by the bank? A. They are furnished the bags.

Q. And it is my understanding that those persons will make up a transmittal slip showing the cash, checks and

other items that they are sending to the bank, that they'll put those in the canvas bag along with a completed transmittal slip and attach a copy of the transmittal slip to the outside. Is this correct? A. Yes, sir.

Q. Then Mr. Meriwether on the armored car goes to the customer's place of business and picks up the bag, puts it in the armored car and brings it back to the bank. Is this right? A. Yes, sir.

Q. Does Mr. Meriwether sign anything or give any receipt to the customer at the time he picks up the bag? A. Yes, sir.

Q. What does he do? A. He will give them a copy of the transmittal slip.

Q. With his initial or something on it? A. With his initial, yes.

Q. Does he give them anything else, so far as you know? A. No, sir.

Q. Now, do those persons sign one of these Comprehensive Dual Control Contracts? A. Yes, sir.

Q. And is the processing, once the bag gets into the armored car, at that point the same as the processing for those bags which are gotten from the receptacle or depository at Plant City Plaza? A. You mean when they arrive at the bank?

Q. Yes. A. In the bank.

Q. This is true? It's the same? A. Yes, sir.

Q. I want to go back to the receptacle or depository at Plant City Plaza now. We have described procedures whereby customers at the Plaza put their receipts in the bag with the transmittal slip after signing a Comprehensive Dual Control Contract and that way cause their monies ultimately to be delivered to the bank. We've also described the use of the envelopes by customers. Is that off-premises receptacle or depository used by any

customers of the bank in any other way? A. In what way —other way are you referring?

Q. Except the two that I've—that we've described. A. Not that I know of.

Q. Are you familiar with all of the accounts of the bank at Plant City Plaza? A. I'd say the majority of them.

Q. Are you familiar with the larger accounts of the chain stores over there? A. Yes, sir.

Q. And do they all use the off-premises depository facility in the manner that I've described? A. Yes, sir, they make their—drop their bags in the receptacle.

Q. Sir? A. They drop their night bags in the receptacle.

Q. Do they follow the other procedures which we've described after they drop their bags in the receptacle?

MR. EDWARDS: I object to that question unless you —when you talk about the other procedures. I think the question is ambiguous.

MR. SMITH: I've already tried to identify the procedure which was used.

BY MR. SMITH:

Q. By that I mean you say they drop their bags in the receptacle. Do they sign a dual control contract. Do they put their receipts in the bag with a transmittal slip; and after it's transported to the bank, is it then posted to the account of the customer by bank employees? A. Yes, sir.

Q. All of the customers do it that way? A. Now, you say "all"—are you referring to—

Q. All at Plant City Plaza. A. I believe so.

Q. Do you have any doubt about it? Are you hesitant about whether some customers might do it another way? A. I don't think so. I was just trying to think if there was any exception.

Q. Now, I want to call your attention to the procedures which are used for the delivering of money from the bank to the customer.

It is true, is it not, that the bank, by the armored car, does deliver monies from the bank to the bank's customers? A. Yes, sir.

Q. Does the bank deliver money to anyone other than bank customers through the armored car? A. No, sir.

Q. Now, what are the procedures followed; describe them in as much detail as you can for the transmittal of money from the bank to customers. A. The customer will call the bank and give someone the change order, a breakdown on how he wants the money. Then it is fixed up and put in a sealed bag and the truck in turn will deliver that to the customer per his request.

Q. What documents are used? A. Transmittal slip and a charge advice.

Q. Now, at the time the bank receives the—excuse me. Let me ask first: Does the bank always receive the request for money by telephone call or does it sometimes receive it either by personal request at the bank or by notes which are transmitted in the canvas bags? A. They receive them by a note in the canvas bag and—

Q. Is this the usual way it is done rather than the telephone? A. Well, now, we have an answering device where they can call in—

Q. I understand. A. —after—

Q. After hours? A. Yes.

Q. And they can also call in during banking hours? A. That is correct.

Q. But my question is is the most usual request for money by putting a note in the bag? A. No, sir.

Q. Is the call the most usual way? A. Yes.

Q. Have the customers recently been advised that they can no longer call in? A. Not that I know of.

Q. Not that you know of. Does Mr. Meriwether ever bring an order saying that customer A told me he wanted so many dollars in change of certain denominations? A. Oh, occasionally I think he might.

Q. Now, when the order is received in the bank and is made up for delivery to the customer, what procedures does the bank go through on its premises? A. We fill the order with each denomination of currency or coin requested, place it in a bag, seal it and fix up the necessary documents.

Q. With the necessary documents? A. Yes, sir.

Q. By which you mean the transmittal slip and the debit device? A. Yes, sir.

Q. Now, how is the transmittal slip used in this connection? Does the bank write anything on it? A. Let's clarify that a minute on that transmittal. The question just before that.

Q. You want it re-read to you, the question? A. Yes, sir.

(Whereupon, the Court Reporter read the following:

Q. "Now, when the order is received in the bank and is made up for delivery to the customer, what procedures does the bank go through on its premises? A. "We fill the order with each denomination of currency or coin requested, place it in a bag, seal it and fix up the necessary documents.

Q. "With the necessary documents? A. "Yes, sir.

Q. "By which you mean the transmittal slip used in this connection? Does the bank write anything on it? A. "Let's clarify that a minute on that transmittal.")

A. The transmittal is fixed up by the customer in some cases.

Q. But it's not fixed up by the customer at the time you receive the order for the money, is it? A. You mean when they call the bank?

Q. Yes, when they call in and say I want $20 in dimes, the customer doesn't in any way at that time send a transmittal slip, does he? A. No, sir.

MR. EDWARDS: Explain to him, Leon, how that part of it works. Give him the details.

A. Well, the customer calls in and we fix up the debit advice which is stapled to the bag; and when it is delivered, they receive the transmittal slip along with the checks or cash in exchange for the—

Q. What do they do with the transmittal slip then? A. They receipt a copy and give it back to the customer and the other is brought into the bank.

Q. Well, do they just receipt a copy of the transmittal slip? A. They give one copy to the customer and the other is brought back in.

Q. And is it brought back in with what? A. With the checks or money in it for the change that has been delivered to them and deposited into a special account for bookkeeping purposes.

Q. Let me see if I understand this. You get a call or an order at the bank for a certain amount of money in certain denominations which the customer wants delivered. At that time the person who is making up the call, making up the order rather, prepares one of these debit slips, which is shown on Mr. Rickert's affidavit as Exhibit C, fills it out, is this correct? A. Yes, sir.

Q. Then that debit slip is delivered to the customer by the messenger with the money ordered which money is in a canvas bag. A. Not necessarily. In this case—

MR. EDWARDS: I object to the word "that debit slip" unless it is termed whether all of the debit slips. In other

words, whether there is more than one and whether they are all attached to the bag, because the question as it is now phrased is misleading.

MR. SMITH: May I say, Mr. Edwards, all I'm trying to do is find out how they do it. All I went is the details.

MR. EDWARDS: Because of the lack of information, it seems that we are talking about a debit slip instead of multiple debit slips. At this point I don't think it's clear as to what happens to all of the debit slips and the question is not clear in that regard.

By MR. SMITH:

Q. At the time the bank receives the order for the money, it makes up the order in the amount requested, the denominations requested, and then the person at the bank, employee at the bank, then makes up one or more of these debit slips which have been identified as Exhibit C. Is this right? A. They make up one for each order.

Q. One for each order. One piece of paper? A. That's at that time.

Q. At that time, and what happens to that one piece of paper? A. Well, I say one piece of paper. I'm referring to a multi-copy.

Q. How many copies are there? A. There's three copies, two carbons, but we refer to it as one.

Q. Okay. Now, you've got three copies of the same slip. What do you do with those three copies? A. One goes to the customer, one is charged to the account and one is a copy remaining in the bank.

Q. All right. One goes to the customer. You mean that it's sent out to the customer? A. At the time.

Q. At the time along with the money by the messenger, is this right? A. Yes.

Q. All right, and you say one is charged to the account. What do you mean by that? A. To a special account—

when I say charged to the account, when the messenger takes the money to the customer and brings it back, our —it's gone ahead and run through the account at that time.

Q. And do I understand you correctly—

MR. SMITH: Mr. Edwards, I'd appreciate it if you all wouldn't communicate.

MR. EDWARDS: I'm not communicating. I want to be sure that he understands the question. He seems to be fumbling about and I don't know whether he understands the question or not.

A. I think I got a little confused on one point there.

By MR. SMITH:

Q. Would you please look at me or the Reporter when you answer the questions? A. Yes, sir. That copy at the bank is run through the work and the customer's copy is delivered to him.

Q. You realize you are under oath here, Mr. Pelham? A. Yes, sir. That's why I say I was confused.

Q. Now, let me go back and see if I understand you. I've got three copies of this so-called debit slip. A. Yes, sir.

Q. When the order is made up, one copy of the debit slip is attached to or delivered with the order to the customer, right? A. Yes, sir. Well—

Q. Another copy—pardon? A. There's two copies goes out.

Q. Two copies go to the customer? A. Yes.

Q. One copy is kept at the bank? A. Yes, sir.

Q. Now, what is done with that copy at the bank? A. It is charged against the account.

Q. Well, physically is it delivered at the time the order is made up to the posting department or is it saved until

the end of the day and all of them that have been used to fill orders that day are then sent to posting? How is it done? A. Well, it goes on in with regular work.

Q. I don't understand how that's done. I've never worked in a bank. Explain it to me. A. Well, they get these copies and they run a tape on it.

Q. Are they sent in one at a time to the posting department or are they all held together and sent in at the end of the day? A. Sometimes. It depends on how they receive them. If they receive just one order, they go ahead and process it. If they receive more than one, they are sent in together.

Q. They are saved and at the end of the banking day when you close, the bank doors close, you then send them back to posting? A. Well, you say "saved."

Q. Well, put in a pile, kept by the tellers until the teller completes his banking day at which time he sends his materials to posting. Is this right? A. Yes, sir, sometimes.

Q. Sir? A. Yes, sir. That goes along with other checks and—

Q. With other checks and materials that the teller has received during the day? A. Yes, sir.

Q. And from the posting point of view, then, all of the information sent to your bookkeeping department that day is put through your equipment that you have in the bank and the punch cards and tapes are sent to the Marine Bank's computer center in Tampa where the posting process is done overnight and it is returned the next day. Is this correct? A. Yes, sir. It is sent over with all the work.

Q. Sir? A. It's sent over to Marine Bank with all the work and processed in the normal manner.

Q. And then the results come back the next day? A. Yes, sir.

Q. At the time a teller receives an order for money, is any determination made whether the person has that much money on account? A. No, sir.

Q. Is any arrangement made with the customer in the event that the customer overdraws his account on that order? For example, is there any agreement that if there is an overdrawal it will be considered a loan to the customer?

MR. EDWARDS: Now, at this point, I think that the witness, because of his hesitant answer, must be instructed as a general principle that if any question seeks to elicit information which he does not have that he is authorized to answer he does not know.

By MR. SMITH:

Q. I understand that, but I also understand from other depositions Mr. Pelham is the Head Teller and is in charge of all these mechanics. A. Well, on occasion there has been an account overdrawn, but nothing out of the ordinary. It could be overdrawn by that item or another check.

Q. And when that happens, do you know of any document or any agreement between the bank and the customer that that overdrawal will be considered a loan? A. No, sir. We do overdraw accounts which, in effect, is a loan.

Q. But there is no agreement with the customer about it, no written document? A. No, sir, none that I know of.

Q. Now, when the messenger takes the change which has been ordered out to the customer, he delivers the bag with two copies of the debits slip, right? A. Yes, sir.

Q. And he gets a receipt from the customer showing that the customer has received the money delivered. Is this correct? A. Yes, sir.

Q. And the customer indicates that he's received it by signing a copy of the debit slip. Is this right? A. Yes, sir.

Q. Now, your messenger brings one copy back to the bank with him to show that he's delivered it. Is this correct? A. Yes, sir.

Q. And the messenger leaves the other copy with the customer? A. That is correct.

Q. Now, at the time the messenger makes delivery of the money to the customer, does he receive in exchange anything from the customer? A. In some cases, yes, sir.

Q. What? A. He receives transmittal currency and coin.

Q. In other words, he completes a transmittal slip such as this one that we've identified as Exhibit B?

MR. EDWARDS: I object to the question on the basis that it is not clear when the question is "he completes." Unless the question identifies who he is—

MR. SMITH: The customer.

MR. EDWARDS: Fine.

By MR. SMITH:

Q. Someone completes it. In other words—who does fill out the transmittal slip, or do you know? A. As a general rule the customer fills it out unless he's tied up. Then—

Q. Then the messenger does? A. He does.

Q. Pardon? A. Yes, sir.

Q. And the customer or the messenger completes the transmittal slip and gives something to the teller. What is it—

MR. EDWARDS: Now—

By MR. SMITH:

Q. I mean the messenger.

MR. EDWARDS: —I object to this line of questioning on the basis that it's not been established that Mr. Pelham

is present, that Mr. Pelham has any first-hand knowledge of what is done and on the further grounds that the testimony of the party which carried out this transaction, the deposition of which has already been taken, is the best evidence, and on the further grounds this man is not qualified to answer because he has no first-hand knowledge and information elicited would be strictly hearsay and I direct the witness not to answer.

Off the record.

(Whereupon, a discussion followed off the record.)

By MR. SMITH:

Q. Mr. Pelham, I understand that you may not be present when these transactions are carried out. I just want to know the procedure which is followed by the bank in doing this or the instructions which are given to the messenger. Mr. Meriwether is an assistant teller of the bank, isn't he? A. Well, now—assistant teller—he is the bank messenger and we utilize him as a teller when necessary.

Q. All right, and he works under your supervision, doesn't he? A. Yes, sir.

Q. All right, sir. Now, going back to the procedure which is followed, the debit slip and the canvas bag with the change is delivered to the customer. The customer then is to give the messenger something in exchange. I just want to know what it is.

MR. EDWARDS: Could you repeat that question, please?

(Whereupon, the Court Reporter read the pending question.)

MR. EDWARDS: I object to this on the basis that there's been—as to what exchange we're talking about. I'm not clear as to what you're talking about.

MR. SMITH: I'm just trying to use a word of the English language. I just want to know what happens. That's all.

By MR. SMITH:

Q. When the money is delivered to the customer with the debit slip, we've gone through the signing procedure. What else happens? That's all.

MR. EDWARDS: If anything?

By MR. SMITH:

Q. If anything? A. I believe I already covered that one point back there when I said that the customer gave him the transmittal slip, money or checks to go back to the bank.

Q. Now, is this in the same amount as the change which is delivered? A. Yes, sir, sometimes. Now, if you're speaking of just change only, he can take change out and pick up the customer's deposit at the same time.

Q. I understand that, but in connection—I'm only talking about the change transaction now. Relative to the change transaction only, when the change is delivered to the customer, does the customer at that time give in return to the messenger a transmittal slip and either a check or currency for the amount of change which has been delivered? A. Yes, sir.

Q. And this is—the customer either gives money to the messenger or the customer gives a check to the messenger in the amount of the money delivered. Is this right? A. Yes, sir, if I understood your question correctly.

Q. Do you want to ask me something about it? A. I was just thinking it was the same thing you asked me in the question before, wasn't it?

Q. Yes, and I thought you answered the same way, but you were giving a general description then and I was going back into the detail of the transaction. A. Yes, sir.

Q. Now, does the bank maintain relative to customers who order money something called a change account? A. Yes, sir. We have a special account.

Q. And tell me how that works. Describe it for me. A. Well, it is an account set up to simplify bookkeeping and where the money is placed in the account and the charge is used to take it out for the change.

Q. Well, is there a certain amount of money which is put up initially by the customer in the change account? A. Not always.

Q. Well, sometimes is there? A. Yes, sir, sometimes.

Q. And how do you differentiate the change account where the customer puts up a specific amount in a specific change account from a situation where the customer just has a general checking account? A. Well, we use account numbers on all accounts, and they are set up with a listing of special account for that particular business.

Q. Mr. Pelham, please explain this to me. I just want to know how it works and I don't understand it. I'd rather not have to drag it out of you. Somebody wants to make use of the service which the bank offers of having money sent to the bank customer, a so-called change operation. Now, what sort of accounts does the bank maintain for the people who want to make use of that service? A. Well, we have a special account. They have a regular account and a special account. The special account or change account, which I prefer to call it, is used to simplify the bookkeeping—well, as far as that goes, ours and the customers.

Q. And does the customer set aside at the beginning a certain amount of money in the special account? A. No, sir, but we can go back to the regular account, if necessary.

Q. What do you mean by that? A. If there is not enough money in that account, we can always get it out of their regular account.

Q. Do you do this by asking the customer if you can transfer from the regular to the special or do you just automatically make the transfer? A. As a general rule, it is at their request.

Q. Well, let's start from the beginning. Suppose I have a store at the Plant City Plaza and I'm interested in using this service for the delivery of money and so I say, "Leon, I want to use your service." Do I have to open an account with the bank in order to make use of the service to order money? A. Yes. Are you assuming you already have a—

Q. No. I'm assuming I've never done business with you. A. Yes, sir.

Q. And I want to start doing business with you. A. Yes. You have to have an account.

Q. All right. Now, I've told you I want to utilize the service of the armored car delivering change or money to me. Now, what kind of an account must I open? A. A regular business account.

Q. A regular checking account? A. Yes, sir.

Q. Now, do I also at that time open a special account for the delivery of the change? A. If it will simplify your bookkeeping method, yes, sir.

Q. Well, who makes that decision? Do I make it or does the bank make it? A. As a general rule, the manager of the store makes it or they will ask us to set one up.

Q. All right, sir, and if a special account is set up for the change operation, am I required then to put so many dollars into that special account? A. Well, not necessarily, as long as we have the right to go to the regular account for the money.

Q. And do you get any document from me which I sign saying that you have a right to go to the regular account? A. Not as a general rule. Most of them are verbal.

Q. Well, how do you explain this operation to customers? What do you tell them?

MR. EDWARDS: I object to this question on the basis of fact that it has not been established that this man opens the accounts or deals with them. Previous depositions, it's established that this is the function of Mr. Meriwether and unless it is shown by proper predicate that this man has this information and does, in fact, do these things, then the question is not proper.

MR. SMITH: I respectfully disagree. The previous testimony has shown that Mr. Meriwether is the delivery boy and Mr. Pelham is the head of the department which handles this and knows the procedures. Well, all I'm asking—what we're talking about now is a procedure that goes on in the bank.

By MR. SMITH:

Q. Just tell me the procedure. That's all I want to know.

MR. EDWARDS: Well, the testimony has previously elicited from Charles Futch, who is the Cashier, and from Mr. Meriwether, who is the bank messenger. Now, unless the question, a predicate question proving Mr. Pelham has knowledge of this is laid, then the question is not proper and I object to it.

MR. SMITH: All right.

By MR. SMITH:

Q. Mr. Pelham, as Head Teller, you know how these accounts are opened, don't you? A. Yes, sir.

Q. Would you please tell me how it is done?

MR. SMITH: Excuse me. There's no need going back through that again. Read my last question before the objection.

(Whereupon, the Court Reporter read the following:

Q. "Well, how do you explain this operation to customers? What do you tell them?")

By MR. SMITH:

Q. Yes. I'm saying, Mr. Pelham, I want to use your service. Now, you're going to have to tell me something about these accounts. What do you say to them? What do you explain to them? A. After the regular account is opened up in the bank, then we'll explain to them we have the change service and then they ask if we would set them up a change account after we have explained the service to them.

Q. And if they say yes, they want a change account set up, then you also set up a change account. Is this right? A. Yes.

Q. Now, is the regular account given a number like my regular checking account in the bank? A. Yes, sir.

Q. And is the change account given a number? A. Yes, sir.

Q. So in your bookkeeping system, you've got two separate accounts on your books? A. Yes, sir.

Q. Now, as a customer, I put money, when I open the account, into the regular account, is this right, so that I show a balance to begin with of X number of dollars? A. Yes, sir.

Q. Now, do I also put money into the change account at that time? A. Well, we keep a small balance in there.

Q. That's not what I'm asking you, sir. Do you require that a separate sum of money be set up in the change account, the special account? A. No, sir, not in all cases.

Q. In some instances if the customer wants to put $500, for example, in the change account, this is done and in other instances there won't actually be any money which

is put into the change account but there will be money in the regular account. Is this correct? A. Yes, sir.

Q. All right. Now, when money is delivered to me as a customer and I sign the debit slip and I give the messenger a transmittal slip with money or checks in the equivalent amount of the change that has been delivered to me, what is done with my money and checks when it gets back to the bank? A. When it gets back to the bank, it is deposited into the change account.

Q. And what is done with the transmittal slip? A. It becomes a deposit slip to that account.

Q. And is it forwarded to bookkeeping? A. Yes, sir.

Q. So that in the same business day you would have the debit slip going through bookkeeping and the transmittal slip going through bookkeeping in the same amount of money? A. Well, it depends on whether it was in the morning or afternoon.

Q. Tell me what happens in the morning as distinguished from the afternoon. A. Well, we have a cutoff time.

Q. Please tell me more. I don't understand the procedure. A. Well, as you know, we have to get all of our work in by a certain time so that we can get closed out and all of the documents on their way to other banks; and so that if it is called in at one o'clock and the charge slip goes through and the customer receives the money at four o'clock in the afternoon, it is past our cutoff time.

Q. So in those instances when the transaction is complete in time, there would in one business day be the debit slip going through your bookkeeping system together with the corresponding transmittal slip. Is this correct? A. Normally, yes, sir.

Q. In other instances you might have the debit slip going through the bookkeeping system the one day but the transmittal slip has gotten back too late to be put in

with that batch, so it's put in the next day. Is this right? A. Yes, sir. We refer to that as a washout account.

Q. I presume you keep a separate card or balance sheet on the washout account, the charge account, for each customer. Is this right? A. Yes.

Q. And it would show where there's an order of $20 on a given day, $20 being withdrawn and then $20 being deposited either on the same day or the next day? Is this right? A. Yes, sir.

Q. Is it, in effect, then, a rotating account? A. Rotating or washout.

Q. Rotating or washout. All right, sir.

Does the bank require the customer to sign any agreement or contract in connection with change accounts before change can be delivered to the customer other than the debit slip? A. Now, that's after the account has been set up?

Q. Well, or at the time that it's being set up. A. Not always.

Q. Does it ever? A. In some cases, yes, sir.

Q. What sort of document is signed? A. Sometimes we'll have a customer that will come in and set up their own special account.

Q. I think you're misunderstanding me. As I understand the procedure, when a customer makes an order for money, the bank at that time makes up the order and also makes up the debit slip, right? A. Yes, sir.

Q. And the debit slip is delivered with the money and is signed by the customer? A. Yes, sir.

Q. Now, I want to know does the customer at any time sign any other document which authorizes the bank to debit his account upon the order of money as is done, according to your testimony? A. Well, I have to say at some times, yes, because it all depends on the way the ac-

count is set up and where the customer has more than one use for that account that he doesn't tell us about.

Q. What kind of document is signed? A. He just opens a special account which would consist of a signature card.

MR. SMITH: Mr. Edwards, the Court, pursuant to our motion to produce, has asked you to produce all documents used in connection with this transaction. Now, we're talking about a document now—

MR. EDWARDS: That I have no knowledge of.

MR. SMITH: That you or I apparently don't know anything about.

THE WITNESS: You are talking about special accounts—

MR. SMITH: Excuse me. Will you produce it for me?

MR. EDWARDS: If I can identify it, yes.

MR. SMITH: Well, surely the bank—

MR. EDWARDS: For the record, at the moment I have produced already all of the documents that I know of. If there is a special written contract that Mr. Pelham now knows about that has not come to my knowledge, I will identify it and produce it for your inspection.

MR. SMITH: Well, I'd better, for the record, also say this that we're required by Court order today to have a brief filed in this cause in connection with the motion for summary judgment. We can't possibly file a brief in connection with the matter when all documents haven't been produced, when all the facts are not established.

A. Let me say this now, in talking about that which is like I said. If a customer comes in and says he wants to set up a special account, he wants to use it for change, in some instances they put their tax money in there which—

By MR. SMITH:

Q. You mean State sales tax money? A. Yes, sir, or withholding tax, as a general rule.

Q. All right. A. We have that occasionally, and they use it, but as far as the truck is concerned, I don't know whether we get one that way or not.

Q. In all of those instances, then, where they use so-called change accounts for taxes or other purposes as well as change, the only other document that they would sign would be a signature card, wouldn't it? A. Yes, sir.

Q. Well, apart from that, is there any document which the customer signs with the bank that authorizes the bank to debit his account upon receiving an order for money? A. We're getting back to the truck?

Q. Right. A. Would you re-state that?

Q. Yes. Does the customer sign any agreement or document of any sort which authorizes the bank to debit the customer's account as is done upon receiving an order for money? A. All that I know of is the charge advice.

Q. That's the debit slip which we've identified here as Exhibit C. Is that right? A. Yes, sir.

MR. EDWARDS: Off the record.

(Whereupon, a discussion followed off the record.)

MR. SMITH: Just let the record show that while we were off the record Mr. Edwards stated that he had investigated the matter and so far as he knows he has produced all of the documents which are used in connection with the transactions.

MR. EDWARDS: That's right. Let the record further show that Mr. Pelham, the witness, concurs that there are no other documents.

MR. SMITH: That's all right with me. He did state that.

By MR. SMITH:

Q. Now, after the order comes for the money and the debit slip is made up in triplicate, the bank keeps a copy, as I understand. Did I understand you to say that it, in some instances, could go immediately to bookkeeping? A. Yes, sir.

Q. And this is before the bank actually has received the debit slips which were sent out to the customer? A. Debit?

Q. The debit slips, yes, sir, Exhibit C. You've got three copies. You keep one at the bank. You say in some instances that one copy is sent immediately to bookkeeping. The other two meanwhile are going out to the customer. The customer signs them and it's given to the messenger and by the time they get back to you, the other slip has already gone through the bookkeeping system? A. It's gone through to proof.

Q. Gone through to proof? A. Yes, sir.

Q. It's already in your bookkeeping system? A. Yes, sir.

Q. Mr. Pelham, do customers who are transmitting money, money to the bank by the messenger service, ever use your regular deposit slips instead of your transmittal slips? A. Are you talking about in the canvas bags?

Q. Yes, sir. A. Not to my knowledge.

Q. What about in the envelopes? A. Occasionally it has happened where we have no control.

Q. And when that happens, do you go ahead and complete the processing? A. Yes, sir. We use—accept the deposit and write them a letter with instructions.

Q. Do you always write letters? A. As far as I know, yes, sir.

Q. Who writes them? A. As a general rule Mr. Futch.

MR. SMITH: Mr. Edwards, will you produce those letters?

MR. EDWARDS: No, not without an order.

MR. SMITH: Pardon?

MR. EDWARDS: Not without an order.

By MR. SMITH:

Q. You mentioned, Mr. Pelham, that on some occasions a customer ordering money will have an insufficient balance in his account and that the effect of the delivery of the money results in an overdrawal on the account. What do you then do when such overdrawal occurs? A. I call the customer and ask him to bring—

Q. Telephone the customer? A. Yes, sir, ask him to bring a deposit in to cover it.

Q. Do you recall an occasion several weeks ago, to be exact, I believe the date was March 29, 1967, when in the afternoon I called on Mr. Ron H. Baker of McCrory's store. Excuse me, Mr. Telford of Grant's store; and while I was there, Mr. Telford placed a call to the bank? A. No, sir. I wasn't aware he placed a call.

Q. Do you recall after my being out at Plant City Plaza on March 29th your getting a call from Mr. Baker? A. No, sir. I never received a call.

Q. Did you receive any call from any Plant City Plaza customers after I was out there on March 29? A. No, sir.

Q. Do you know if anyone in the bank did?

MR. EDWARDS: Now, I object to that on the basis of the fact that these customers call the bank constantly and unless there is some—unless the call is better identified or unless the question indicates that you're simply looking for any kind of telephone call.

By MR. SMITH:

Q. What the context of my question was do you know if any customer called the bank reporting my visits out there and advising the bank that I'd been there discussing

the matter with them? A. I had heard you had been out there, but I didn't know where they received their information from. I didn't ask them.

Q. Customers told you this or persons at the bank told you? A. Some of the bank personnel.

Q. Who told you that? A. I believe Mr. Meriwether told me.

Q. Now, do you know if the bank took any action in contacting customers after I was out there? A. Took any action?

Q. Yes, did anything to contact customers after I was there? A. Not that I am aware of.

Q. You have no knowledge of Mr. Futch calling on people after that? A. I've seen him out at the shopping center, but I don't know—

Q. But he didn't tell you he was going out there as a— A. He didn't tell me anything.

MR. SMITH: I have no other questions.

Examination by Mr. Edwards

Q. Mr. Pelham, what do we mean by validating a transmittal slip? A. When we validate the transmittal slip, in effect, we receipt it where—we show where it has gone through a particular teller's window with their stamp and initial on the item.

Q. What is the significance of validating that slip?

MR. SMITH: That asks for a legal question, doesn't it, legal answer.

MR. EDWARDS: Strike the question.

By MR. SMITH:

Q. Let me ask you this: Do you have a validating stamp for each teller? A. Yes, sir, each teller has a stamp.

Q. And what are these validating stamps used for? A. They stamp each item—I say each proof item as they go through to show which teller handled the item and that it has been processed.

Q. And where are these validating stamps affixed? A. At the teller's window.

Q. Are these done to all items coming into the bank? A. Yes, sir, unless there is a batch of checks or something that are deposited in there, then they are not stamped individually for the reason that they were not handled individually.

Q. Where does the validation of the transmittal slips originating from the customers and users of the messenger service, where are they validated? A. They are actually validated when the teller works them up in the bank there. They—

MR. SMITH: Please, Mr. Edwards—

MR. EDWARDS: Well, I'm through.

MR. SMITH: —don't signal to your witness and cut him off in the middle of a statement.

By MR. EDWARDS:

Q. Go ahead and make any additional statement you want to make. A. I was going to say Mr. Meriwether receipts everything he picks up.

Q. And where does he receipt it? A. At the bottom of it.

Q. All right. Now, by receipt what do you mean and by validate what do you mean? A. By receipt he initials to indicate he picked up the item.

Q. All right. A. And to validate, it has the teller's stamp.

Q. The item that is receipted for say at the Plaza is brought to the bank and what's done then? A. It is proc-

essed by the teller and the stamp is placed on the deposit slip.

Q. The stamp, the validating stamp? A. Yes, sir, the teller's validating stamp.

Q. All right. On direct examination you were asked by Mr. Smith if you knew of any exceptions where the procedures which had been outlined by testimony were not followed in the Plant City Plaza with any customers of the bank. A. Any procedure?

Q. Mr. Smith—you had testified to Mr. Smith's questions that a customer at the Plaza or anywhere wanting to use the service must have an account at the bank, have signed a dual control contract and that then undertakes the service. A. Yes, sir.

Q. And he went through considerable explicit procedures. Do you know of any exceptions to this in the Plaza or otherwise? A. No, sir.

MR. EDWARDS: I have no other questions.

Examination by Mr. Smith

Q. Does Mr. Meriwether have a validating stamp? A. No, sir. The teller he works under does.

Q. Does he use a validating stamp at that teller's cage? A. Occasionally, yes.

Q. Mr. Meriwether used to work in the bank as a teller in the bank, didn't he? A. Yes, sir.

Q. He's trained in the procedures that are used in the validation? A. Yes, sir.

Q. And he actually does validate some of the receipts which are picked up from customers by the armored car? This is true, isn't it? A. As far as the ones picked up by the armored car, I don't know. He works that window sometimes is the reason I say he uses the validating stamp.

MR. SMITH: No other questions.
Do you waive signature?

MR. EDWARDS: I was just trying to—there's a couple of things in there that worries me as to whether or not Mr. Pelham—let me suggest to you, Mr. Smith, that Mr. Pelham—as soon as you get this transcribed, Mr. Pelham will be happy to go to Tampa so as not to delay you in getting this filed; but I think he possibly would want to read this before he signs it.

MR. SMITH: All right. Mr. Pelham, under the Federal law you have a right to read and sign this deposition after it's transcribed for the purpose of correcting any errors that the Reporter might have made, not for the purpose of changing your testimony.

In the alternative, you can waive the reading and signing of it. Mr. Edwards is suggesting that you should read and sign it. It will be necessary, if you do that, for you to go to Tampa and read and sign it before this lady who is a Court Reporter. Is that all right with you?

THE WITNESS: I would like to read it because there's two or three places I was thoroughly confused.

MR. SMITH: Well, let's go back to those two or three places now. I would like to know where it is you were thoroughly confused and we'll try to get unconfused.

THE WITNESS: Something about those special accounts there that I was confused on.

MR. EDWARDS: If counsel has finished his questions, I think reading and signing would suffice.

MR. SMITH: Well, my point is this: We have a motion for summary judgment next Tuesday. All I'm doing here is asking the man who is in charge of the whole teller operation in this bank to explain the procedures with which he should be thoroughly familiar and I just don't want to suddenly be advised that what he explained as

the procedure isn't right. I have to get it straight today. Now, I think we went back in all areas and tried to clarify all language. There weren't any trick questions involved. I don't know of any place where there was a misunderstanding; but, if so, I would like to get it cleared up today.

MR. EDWARDS: Now, for the record, let the record show I think, also, that you went back and that it was clarified; but, again, on the possibility that it was not clarified, then the reading and signing seems to be appropriate so that I feel it was clarified; but I do not know that as a fact at the moment and Mr. Pelham, I'm sure, does not know that and he can ascertain whether it was when he reads it.

Now, for the reason that you're coming to Tuesday at a hearing is the reason that I suggested the witness volunteer to travel 22 miles to Tampa to assist you in reviewing it so that you can get it filed. Otherwise, I do not understand that he's obligated to do that. He's willing to do this in order to be cooperative.

MR. SMITH: I understand that.

MR. EDWARDS: And this is the reason we're taking this position.

MR. SMITH: I understand that and all I'm saying now is, if I correctly understand the law, the purpose—I don't object to his reading and signing. He's got every legal right to do that.

MR. EDWARDS: That's right.

MR. SMITH: As I understand it, it's for the purpose of correcting errors which the Reporter might have made.

MR. EDWARDS: That's right.

MR. SMITH: Therefore, if there's to be any change in testimony as distinguished from correcting error, I would like to do that while I'm here today.

MR. EDWARDS: I'm not aware of the necessity of any change of testimony.

MR. SMITH: I'm asking Mr. Pelham is he aware of any and apparently he can't think of anything at this time. Is that right?

THE WITNESS: No.

MR. SMITH: All right. Thank you very much.

/s/ Jessie Leon Pelham
Deponent

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF MARY JANE DAVIS —FILED APRIL 24, 1967

• • •

The deposition of MARY JANE DAVIS, taken by counsel for Defendants-Intervenors on the 19th day of April, A. D., 1967, beginning at the hour of 11:50 o'clock a. m., at 107 South Evers Street, Plant City, Florida, before Thelma Helene Dreyer, Notary Public in and for the State of Florida at Large.

Thereupon the said

MARY JANE DAVIS,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Will you state your full name please? A. Mary Jane Davis.

Q. Where do you live? A. 3401 Boot Bay Road, Plant City.

Q. What is your age? A. Twenty-one.

Q. What is your occupation? A. Office clerk at W. T. Grant Company.

Q. How long have you worked for Grants? A. Since September.

Q. Of 1966? A. Yes.

Q. And is the store that you work at the one that's at Plant City Plaza? A. Yes, sir.

Q. Do you work under the direction and supervision of Mr. Telford? A. Yes, sir.

Q. We understand that your store makes use of the facilities of the First National Bank which are called the off-premises depository or receptacle which is out at Plant City Plaza and of the armored car service which the bank furnishes. We want to ask you some questions about that. A. Okay.

Q. Are you familiar with the procedures which are used in communicating or transferring money from your store to the bank and getting money from the bank to your store? A. Yes, sir.

Q. What procedure do you follow or does your store follow in preparing money to be put into the depository? A. Well, I make out a deposit slip and the money goes into the bag and I lock the bag and the money is given to two of the store men and they take it down and put it in the depository.

Q. Now, is the slip which you put in the bag similar to the one which is here before you and is marked Exhibit B? A. Yes, sir, the white one.

MR. SMITH: Let the record show we are referring to Exhibit B to Mr. Rickerts affidavit again.

A. Yes, sir.

BY MR. SMITH:

Q. Are you acquainted with a document like the one that I'm showing you now which is Exhibit A attached to Mr. Rickerts affidavit which is called a Comprehensive Dual Control Contract? A. No, sir.

Q. You have never signed one of those for the store? A. No, sir. I don't think.

Q. When the transmittal slip is made out, who makes it out? A. I do.

Q. Who puts the writing on the front of it? A. I do.

Q. Have you had any discussions with any representative of the bank about the transmittal slip and the operations? A. You mean recently or—

Q. At any time. A. Yes.

Q. When was this? A. I talked to Mr. Meriwether about —you mean—you know, he tries to explain to me how things are done and all.

Q. Mr. Meriwether is the fellow on the messenger truck? A. Yes.

Q. Have you talked to anybody besides Mr. Meriwether? A. No.

Q. And have you talked with Mr. Meriwether about it recently or has it been sometime ago? A. Well, I was asking him—Mr. Telford had asked me had anybody ever explained the back of this slip and they had and I didn't understand it so I asked Mr. Meriwether to explain it to me again and he did.

Q. Now, did Mr. Telford ask you about it after I was out to the store on March 29 of this year? A. Yes.

Q. And did you talk with Mr. Meriwether about it after I had been out there on March 29? A. Yes.

Q. Now, I'd like to turn your attention to the situations when you order money or change to be delivered from the bank out to the store. Are you familiar with that procedure? A. Yes.

Q. Who decides how much money is desired by your store? A. I do.

Q. And who places the order— A. I do.

Q. —for the amount that you want? A. I do.

Q. Do you order essentially change to be used in the business of the store? A. Yes.

Q. And do you tell the bank what denominations you want—so many dollars worth of dimes and so many dollars worth of quarters? A. Yes, sir.

Q. And so many bills of certain denominations? A. Yes, sir.

Q. You perform that yourself? A. Yes.

Q. And how do you advise the bank in this regard? How do you get the word to them? A. Well, I usually just call the bank and tell Mr. Pelham what I want.

Q. And when you do that are you ordering the change for the day's business or is it for the next day's business? A. Well, whenever I run out. It's usually for that day and the next.

Q. When the money is delivered to your store, it comes by the messenger—the armored car, is this correct? A. Yes.

Q. And Mr. Meriwether brings it in? A. Yes, sir.

Q. And does he bring it in in a closed bag? A. Yes.

Q. And when it comes in, what do you do? A. He opens the bag and I count the money and make out a deposit slip and I give him the amount of money that the change calls

for and we put it in a sealed envelope and I give it back to him.

Q. Do you sign anything or make out any paper other than the deposit slip? A. Yes, sir. I sign—I don't know what it is. I sign something.

Q. Calling your attention to Exhibit C attached to Mr. Rickerts affidavit and looking at that document, is that the type of document you sign? A. Yes, sir.

Q. Have you been given any authority by either Mr. Telford or anyone in the Grants organization superior to you to make contracts in behalf of Grants? A. I don't understand.

Q. Well, do you know what a contract is? A. Yes.

Q. Has anyone told you that you were authorized to make a contract for Grants? A. No.

Q. Do you have any check writing authority, that is check signing authority? A. No.

Q. Are you familiar with the accounts which Grants maintains at the First National Bank? A. Yes.

Q. How many accounts does it maintain? A. Three I think.

Q. Would you describe them please? A. An agents account to write checks and a special account for our change and then our regular deposit.

Q. All right. Now, the agents account is an account which Mr. Telford writes checks against to pay the bills of the store. A. Yes.

Q. Do you know when that account was opened? A. No I don't.

Q. Has it been open ever since you can remember working in the store? A. Yes, sir.

Q. Do you know whether any money was put in it at the time it was opened? A. Yes, sir, there was, $100.

Q. Did that come from New York? A. No, I don't think so. I think it came right out of our store.

Q. Now, when the account for receipts was opened, do you know if any money was put in it? A. No, I don't know.

Q. To your knowledge how long has that account for receipts been open? A. I don't know.

Q. Has it been ever since you've been acquainted with Grant's? A. Yes, sir.

Q. And that's been ever since the store was opened? A. Yes, sir.

Q. And I understand in that account your daily receipts are sent to the bank and placed in that account. A. Yes.

Q. Do you know who has—if anybody locally has check writing authority against that account? A. Nobody has.

Q. Nobody has. Now, let's talk about the change account. Do you know who opened that account? A. No I don't.

Q. Do you know when it was opened? A. No I don't.

Q. Do you know if any money was put into it? A. No I don't.

Q. Do you know if anybody authorized a transfer of funds from the regular receipts account or from the agents account into the special change account? A. No I don't.

Q. Do you know if in fact a balance is maintained in the special change account? A. No I don't.

Q. Did you ask for the special change account to be opened? A. No.

Q. Do you know why it was opened? A. Well, so that we could get change from the bank.

Q. Did the bank say that this was the way to do it? A. I don't remember.

Q. Do you know what person opened that account? A. No I don't.

Q. Well, can you testify that that account actually was opened by somebody in Grants rather than being set up by somebody at the bank? A. No I couldn't, not right now.

Q. Is there any attempt by Grants to maintain a balance in the change account of so many dollars? A. No.

Q. Would it be correct to say with reference to the change account that you simply make an order of money from the bank and at the time the money is delivered you give them an equivalent sum of money which they take back? A. I make a deposit to the bank.

Q. Yes. When you do that, do you indicate any special information on the deposit slip? A. Just in principle it has special account, W. T. Grant Company.

Q. Does it have a number on it? A. I don't know.

Q. Do you write a number on it when you make the slips out? A. No.

Q. You just write special account W. T. Grant Company? A. Yes, sir.

Q. Looking again at Exhibit C attached to Mr. Rickerts affidavit there is a statement which says your account has been charged for the total shown hereon representing monies requisitioned for delivery to you by the bank's messenger. Do you know which account is charged for that requisition? A. No, sir I don't.

Q. Do you know what account they are referring to when they say your account? A. Our change account I imagine.

Q. Your change account. Do you know if at the time you actually order this money and it's brought out and you sign this slip whether Grants actually has money in the change account? A. No I don't.

Q. When you sign that Exhibit C, do you get a copy of it? A. Yes I do.

Q. What do you do with your copy? A. I save them. I put them in a drawer.

Q. You just keep them? A. Yes, sir.

Q. Do you ever mail them anywhere? A. No, sir.

Q. Do you throw them away after awhile? A. Yes, sir.

Q. When you make out the deposit slip identified as Exhibit B, do you keep a copy of that? A. Yes, sir.

Q. What do you do with the copy you keep? A. Put it in the same drawer with the other ones.

Q. Is there a copy of that mailed anywhere? A. No, sir.

Q. Does the bank, after you put your money in the receptacle or depository at Plant City Plaza and it's taken down to the bank, does the bank mail you back a copy of this Exhibit B? A. There's two copies brought back with our deposit.

Q. I don't understand. What do you mean two copies are brought back? A. Are you talking about our regular night deposit?

Q. Yes. A. When we get it back, we have to have two copies of this deposit. We make out five copies. Four goes to the bank and they bring us two back with a stamp on it.

Q. They bring them back to you the next day? A. Yes, with our bag.

Q. Is this just handed to you by Mr. Meriwether? A. Yes.

Q. And what do you do with those two copies with the stamp? A. One goes to New York and one is filed in our store.

Q. And do you keep those permanently or do you throw those away? A. No. Those are kept permanently.

Q. Have you ever been down to this facility that's there in Plant City Plaza? A. Yes, sir.

Q. Did you see while you were down there the desk that they have where people can write on it? A. Yes, sir.

Q. Did you see some materials there including this transmittal slip and green envelopes? A. I don't really remember.

Q. You don't remember. Have you ever used a green envelope to make deposits? A. Yes, sir.

Q. For Grants or for yourself? A. For Grants.

Q. And tell me about how you would do that? A. Well, the only time I ever used the green envelopes was for the change.

Q. Are there some occasions when you mail in money for change before it's brought to you? A. No.

Q. But there are some occasions when change is delivered to you and you don't pay for it at the time but you send it— A. No.

Q. When is it you use this green envelope? A. I put my money, the cash, in the green envelope and seal it and give it to Mr. Meriwether.

Q. I see. You don't put it in the depository. A. No.

Q. But when you are giving your money in exchange for the change that's brought to you, you put your transmittal or deposit slip in the green envelope? A. Yes.

Q. Do you do that all the time? A. Yes.

MR. SMITH: I have no other questions.

Examination by Mr. Edwards

Q. Miss Davis—Mrs. Davis? A. Mrs.

Q. When money is transmitted to the bank for deposit to the regular account, you place it in this canvas

bag with a transmittal slip which is identical to this identified as Exhibit B to Mr. Rickerts affidavit, is this so? A. Yes.

Q. When do you receive an acknowledgement of receipt of these monies from the bank? A. The next day.

Q. And how do you receive that acknowledgement? A. It is brought back in our bag. It's locked.

Q. And what is the nature of this acknowledgement? A. It has the bank stamp on it.

Q. All right. Now, what do you transmit to New York? A. The copy of this and one stays with us.

Q. Does the one that you transmit to New York have the stamp on it? A. Yes.

Q. Do you ever transmit one that doesn't have the stamp on it? A. No.

Q. Why? A. I don't know. We just can't.

Q. All right. Now, if the monies that was in that bag were not as much as noted on the messenger transmittal slip, what would be the situation or what is the situation? A. Well, we don't have enough money in our bag, if somebody has miscounted the money, usually Mr. Pelham will call and tell us and Mr. Meriwether will come out and I pay him the amount because our deposit slips can't be changed.

Q. So that the shortage the store makes up? A. Yes.

Q. Can you tell me whether or not Mr. Telford was requested to sign a Comprehensive Dual Control Contract by you or by anybody to your knowledge? A. I don't know.

Q. When change is brought to you at your request, you stated that you signed a charge slip similar to this Exhibit C. A. Yes.

Q. What do you—do you give Mr. Meriwether currency? A. Yes.

Q. At that time? A. Yes.

Q. Is it identified on a transmittal slip similar to this identified as Exhibit B? A. Yes.

Q. Is it always currency? A. Yes.

MR. EDWARDS: I have no further questions.

Examination by Mr. Smith

Q. The reason that it's always currency is because nobody at Grants here in Plant City has a right to write checks except against the agents account, isn't it?

MR. EDWARDS: I object to the question on the basis of leading.

BY MR. SMITH:

Q. Well, what is the reason that you always give currency instead of checks? A. I don't know really.

Q. Does anybody in the store have authority to write checks, sign checks? A. No, just Mr. Telford.

Q. And does Mr. Telford have any authority to sign checks on anything other than the agents account? A. I don't know.

Q. You don't know. All right. In these situations where there are so-called shortages, that is the bank advises you that there's less money received in the bag than is shown on the transmittal slip, does this happen often? A. No, sir.

Q. Has it ever happened? A. Yes, sir.

Q. And when it does happen, you say you are contacted by the bank and then Mr. Meriwether comes out? A. Yes, sir.

Q. What procedure do you go through with Mr. Meriwether then? A. He just says Mary your deposit was short and I give him the money.

Q. You just hand him the money? A. No. I put it in an envelope.

Q. Do you sign anything? A. No.

Q. What kind of envelope do you put it in? A. In a green envelope.

Q. Do you include one of these deposit slips or transmittal slips? A. No, sir.

Q. Do you write anything on the green envelope? A. No, sir.

Q. You just hand him money in the envelope which he takes away with him? A. Yes, sir.

MR. SMITH: Thank you.

MR. EDWARDS: If you would, let's stipulate that the green envelope referred to in this deposition is that envelope printed by the First National Bank with information on the outside relative to the nature of the transmittal being taken.

MR. SMITH: Well, let's be sure that—I don't want to stipulate to something I don't know about personally.

MR. EDWARDS: All right.

Examination by Mr. Smith

Q. We've been talking about a green envelope. Is it one that's prepared by the First National and has writing on the outside of it? A. Yes.

MR. SMITH: All right.

MR. EDWARDS: I have no further questions.

MR. SMITH: Mrs. Davis, this deposition is taken pursuant to the Federal Rules of Civil Procedure. You have a right to read and sign the deposition after it's been transcribed into the English language. The purpose of this is to correct any errors which the Reporter might have made in taking it.

Alternatively you can waive the reading and signing. If you elect to read and sign, you and the Reporter will have to make some arrangements for you to get together. We'd like to know whether you wish to read and sign or whether you're willing to waive.

Let's go off.

(Whereupon, a discussion followed off the record.)

MR. SMITH: You waive the reading and signing?

THE WITNESS: Yes.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition by the witness be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing of this deposition be waived.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF RONALD H. BAKER —FILED APRIL 24, 1967

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The deposition of RONALD H. BAKER, taken by counsel for Defendants-Intervenors on the 19th day of April, A.D., 1967, beginning at the hour of 10:30 o'clock a.m., at 107 South Evers Street, Plant City, Florida, before Thelma Helene Dreyer, Notary Public in and for the State of Florida at Large.

Thereupon the said

RONALD H. BAKER,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Would you state your full name please sir? A. Ronald Hugh Baker.

Q. What is your residential address? A. 1302 Oakdale Avenue.

Q. Plant City? A. Yes, sir.

Q. What is your age? A. Thirty-three.

Q. What is your occupation? A. Retail merchant for McCrory's Store Corporation.

Q. How long have you been employed by McCrory's? A. A little over ten years.

Q. How long have you been associated with McCrory's in Plant City? A. Approximately eight months.

Q. Does McCrory's have a store at Plant City Plaza in Plant City? A. Yes, sir.

Q. And do you have any responsibilities regarding that store? A. Store manager.

Q. Do you have any superiors here in Plant City in connection with the store operation? A. No.

Q. You are the boss on the local scene. Is this right? A. I'm the store manager, yes.

Q. How long have you been working in connection with McCrory's store at Plant City Plaza? A. Approximately eight months. The store opened in October and I got here the first of September last year. That's about eight or nine months.

Q. Are you acquainted with the facility at Plant City Plaza owned and maintained or rather leased and maintained by the First National Bank which is called an off-premises receptacle or depository? A. Am I familiar with it? Is that what you asked?

Q. Yes, are you familiar with it? A. Yes.

Q. Does your store make use of the facility? A. Yes.

Q. Are you also acquainted with the armored car service which the First National Bank has? A. Yes. I've seen the car.

Q. Does your store make use of that facility? A. Yes.

Q. Could you tell us generally when your store started making use of these facilities? A. October 13th last year.

Q. Who in your organization was the person that made the arrangements with the First National Bank and opened the necessary accounts? A. I don't know her name. I'd have to get the correspondence out. They had contacted the company before I was even here and we had an account number and I got a letter in the mail before we even opened saying we would use the facilities of the First National Bank. It was all set up. I can't remember who signed that letter from the home office.

Q. It was somebody then outside of the local organization? A. Yes. The home office was in New York at that time but the office was moved to York, Pennsylvania; but at that time it was in New York.

Q. All right. Now, what sort of business is McCrory's in? A. Retail.

Q. What does it sell generally? A. Variety type merchandise.

Q. Does McCrory's have another store in Plant City apart from the one at Plant City Plaza? A. Yes, sir.

Q. Do you know what bank it regularly banks with? A. The Hillsboro.

Q. Do you know of your personal knowledge why McCrory's chose to use the First National Bank in connection with the store? Mr. Baker, I said your personal knowledge because I'm sure he would object if it was something you heard rather than something you know. A. Well, security purposes. It's the closest bank. When I managed the store in St. Pete, we had three stores and three different banks. We all banked in the bank that was closest to the store building because we have to take two people with our bank deposit to the bank or the bank depository, whichever we use, and the farther away you are the more it costs you tying up personnel and the more risk of getting robbed so they always go to the closest bank.

Q. Is this something you know because you made the decision to select the bank or are you speculating? A. Well, I don't—I never—I'm just speculating on this.

Q. All right.

MR. SMITH: Then I move to strike the response.

BY MR. SMITH:

Q. Did any armored service solicit the business of McCrory's store, an independent armored car service? A.

When you say solicit McCrory's, you mean solicit the home office or solicit me?

Q. You. A. One came and talked to me but my contract with the company, the first sentence in it says I can't negotiate any type of contracts for McCrory's so I couldn't have done anything anyway. All I could have done was forward it which I did talk to my comptroller and he said no. It's $36 a month and we're not going to pay $36 a month when we can use this.

Q. All right sir, and who was it called on you? A. I believe it was Brink's.

Q. Was it Brink's or Security Transport? A. I don't know now that you mention it. I've got the card back on my desk. I kept it.

Q. Well, I called or conferred with you on or about March 29th this year, didn't I? A. You came in to see me.

Q. And you showed me a card at that time. A. That was the card, yes.

Q. To refresh your recollection, wasn't it Security Transport? A. It could be. I didn't pay that much attention. I guess it could be.

Q. Now, would you describe briefly the procedures which your store goes through in making use of the off-premises receptacle or depository at Plant City Plaza? A. Well, we take our daily receipts and make up a deposit and put it in the bag supplied by the bank and drop it in the night depository or the depository. We call it night.

Q. Are you familiar with a document which is called a Comprehensive Dual Control Contract? I show you a copy which is identified as Exhibit A in connection with Mr. Rickerts affidavit. A. Yes. I signed so that they could open my bag up. That's what this boils down to for me, isn't it? That they would have permission to open my

bag up with two tellers and count my money without me being present?

Q. Yes. A. Yes. I signed—

Q. You signed a document like this Comprehensive Dual Control Contract that I'm showing you? A. Well, because I'm not that familiar with banking, I'm not sure if it's exactly like this or not; but I know I signed a contract that would give the bank permission to open our bag up and count our money without our being present.

Q. All right. A. What the exact form looked like now, I can't say because I don't see that many of them.

Q. Were you furnished with a canvas bag and a key to the depository? A. Yes.

Q. Did you pay anything for it directly? A. I didn't pay anything directly, no. Whether there was anything sent between our home office and them, I don't know.

Q. Now, when you place your receipts in the canvas bag and put them in the depository, does your store also include a document such as the one I'm showing you here which is Exhibit B attached to Mr. Rickert's affidavit and is entitled Messenger Transmittal? A. Yes.

Q. This messenger transmittal slip has on the back of it something entitled Contract. A. Yes.

Q. Are you aware of that? A. Yes.

Q. Prior to the time that I called on you on March 29, 1967, do you have any recollection of any representative of the First National Bank discussing that contract with you? A. No. I couldn't remember exactly if they did—there was too many things explained when we opened up and the only thing I was interested in is how I got the money to the bank and how I got my receipts so that I could keep my money straight.

Q. All right, sir. Does your store ever obtain money from the bank through the armored car service? A. Are you referring to change you mean?

Q. Yes. A. Yes. We get change from them.

Q. How does your store place the order? A. Well, the way we use it the most is we place a slip of paper in the bag with the amount of change that we want. We have put money in the bag requesting change and we have used the phone requesting change. The majority of the time was a slip of paper in the bag with denominations of the currency and what bills we needed.

Q. Have you recently been advised that changes must be made in that procedure? A. No. We can get change all three ways.

Q. To refresh your recollection, am I incorrect in that you told me last week that after my visit Mr. Futch came out to see you and that subsequently had indicated that you couldn't place orders by telephone any more? A. Well now, I was talking with the cashier, Sandra, if you remember, because she is the one that told me about ordering the money and that was the understanding I got from her; but I called up the bank and asked them and they told me we could get it any of the three ways that we had been in the past. Where she got her information, I don't know. My cashier does all of the physical work involved in this. I personally don't do hardly any of it.

Q. Sandra, you mean Sandra Smith? A. Yes. She makes up the deposits herself. She's the one—she knows when she needs change. I don't involve myself in that. I don't have time.

Q. All right. Now, when you order the change by whatever method you do order, do you ask—do you obtain it in certain denominations, that is coins be delivered to you in so many dollars in dimes and— A. So many pennies and so many dimes, yes, we specify what we want.

Q. And when that money is brought to you, what procedures are gone through? A. It depends on how

we requested the money. If we requested the money by putting money in the bag, we just take the money and we sign a slip that Bill Meriwether has. If we phoned in for it or just put a slip of paper in the bag with no money, then we have to sign a debit thing and another bank deposit slip.

Q. By the debit thing, are you referring to a document like this which we call Exhibit C attached to Mr. Rickert's affidavit? A. Yes, sir. Ours is always pink. It could be the original copy is white.

Q. The language and the format is the same? A. Well, as far as I know. I mean—

Q. Here's one you gave me from your store the other day which you might want to compare. A. Yes. They're the same thing.

Q. Now, you say that when you send your money in your bag the night before with an order and they deliver the order the next day that you sign a receipt when you get the money. Is this correct? A. Yes. I sign something for Bill. I guess—he has it on a clipboard. I don't know what that is.

Q. Is it a different document than this Exhibit C? A. Yes. I wouldn't know what the document looked like. I didn't pay that much attention.

Q. But it is not the Exhibit C? A. Not to my knowledge. It's not this form right here when we put our money in the bag.

Q. All right. Do you have, you or anyone in your store locally, have check writing authority? Can you write checks in behalf of the store? A. Oh no, not not in behalf of the store.

Q. All right. For example, if you wanted to put money into the bank—excuse me. If you wanted to pay for the change that was delivered to you, in your instance what you do is send actual currency? A. We have no checks. I can sign no checks for McCrory's.

Q. All right sir. Do you receive the monthly statements of the bank accounts which your store— A. No.

Q. —maintains with the First National? A. No.

Q. You do not? A. I don't, no. The local store does not receive that information.

Q. Do you know how many accounts your local store has with the First National? A. As far as I know they have just the one account and the change account.

Q. One account and the change account? A. Yes. The way I understand the change account is a separate account set up for just change only.

Q. You have then two different accounts, a regular checking account and then a change account. Is this right? A. The way I understand it, yes.

Q. Now, have you ever personally filled out these messenger transmittal slips that we've identified— A. Yes.

Q. —as Exhibit B? A. Yes.

Q. And in filling those out, do you put the words change account— A. Yes.

Q. —on it? A. Yes.

Q. Has that been your invariable practice before now? A. No. No. In the past when Bill brought the change—

Q. By Bill, you mean Mr. Meriwether? A. Mr. Meriwether—he'd fill the form out for us and I'd just verify the dollar amount he'd put down. That was the only thing I was interested in, and I didn't pay much attention to what was written up here. He wrote that in himself. He'd sit at the desk; and while I was counting the change, he'd fill this out and I'd check the amount he had on the bottom and I'd sign them.

Q. This is when you were ordering change? A. Yes. We always make out our own bank deposit for our daily receipts.

Q. And do you ever deliver those directly to Mr. Meriwether rather than putting them in the depository? A. I've taken daily receipts to the drive-in teller and inside the bank both. There are some days I need to have a receipt back in a hurry. The company maybe wants it. For some reason they want a receipt airmailed to them so I have to take it to the bank. I can't wait.

Q. Do you ever deliver your daily receipts directly to Mr. Meriwether to be taken to the bank rather than putting them in the depository? A. No. I never give anything to Mr. Meriwether.

Q. Except the transmittal slip in connection with the change transaction? A. Yes. I've never given Mr. Meriwether any money of any kind, the deposit or money for change. Oh, money for change I've given him, yes; but only the same amount I got from him is what I'm trying to say. I've never given him money in advance for change, put it that way. I've never given—said here's $20 and would you bring me back four rolls of dimes. I've never done anything like that. It's always he brings the dimes to me first and then I give him the money for the dimes.

Q. Excepting those instances where you have put say $20 in your bag the night before with a note that said you wanted $20 in dimes? A. Yes, but we didn't give that to Mr. Meriwether.

Q. In each instance where you order change, you have in one way or the other given the bank an equivalent amount of money for the change. Is this correct? A. Yes.

Q. You mentioned originally Mr. Meriwether was filling out these transmittal slips. A. Or Sandra might have, but I never personally did until I just wanted to fill one out just to see.

Q. Right. A. Right, but I never did myself, no.

Q. Have you received any recent instructions about filling out those transmittal slips? A. You mean—

Q. You or your store. A. Received any instructions?

Q. Did Mr. Meriwether indicate that it was necessary to put the change account number on the slip and did he tell you this recently? A. No. No. The change account has been printed on these slips. They're already on them. We still don't write the number on them. They're already there.

Q. The one to which you refer—incidentally, the information which you just gave me about the number, you learned this recently? A. Yes.

Q. You were told this by Mr. Meriwether after I came out to see you in March? A. Yes. I questioned them about it.

Q. Just so we'll have it straight on this record. A. Yes, that's right. After you came and saw me, then I got interested in exactly how everything was more than I was and I began to ask questions and they gave me answers.

Q. And prior to this time you hadn't asked those questions? A. No. I hadn't delved into it. I had no reason to. I trusted the bank and the company set the bank account up and I just went along with it.

Q. So it was after my visit when you started inquiring of Mr. Meriwether that you learned about the number on the slip? A. That's right.

Q. Well, at that time did Mr. Meriwether also indicate to you that the change account number would have to be put in on the transmittal slip? A. What do you mean on the transmittal slip? Do you mean on this slip right here?

Q. Yes. A. No. He showed me that it was typed down here. We never have entered a number actually ourselves.

Q. Well now, the one to which you are now referring shows at the top of it—

MR. EDWARDS: Now, at this point I'm going to object to further discussion of this slip until it is made an exhibit so that it can be referred to.

MR. SMITH: All right. I'll offer it as Exhibit A in connection with this deposition.

(Whereupon, Defendants-Intervenors Exhibit A was marked for identification.)

(Exh. A Not Printed)

BY MR. SMITH:

Q. Now, pointing to Exhibit A, at the top it says McCrory's number 356 change account. A. Yes, sir.

Q. My question to you is did Mr. Meriwether indicate that that language would have to be put on the top there in the future? A. Yes. Yes.

Q. This particular one that we're referring to is dated April 4, 1967. This is one where you handled a transaction after I came out to see you. A. Yes, sir. That is correct.

Q. In order that you saw how it was carried out? A. Yes. That's right.

Q. Do you know if your store has a special change account at the First National and in addition a regular account? A. Only—wait a minute. Ask that again.

Q. Do you know whether your store maintains two accounts or more at the First National or do they just maintain one account? A. The way I understand it is McCrory's only opened one account; and when we needed change, the bank opened up a change account for us is the way I understand it, but—

Q. Where did you get that understanding from? A. From—well, from talking to the personnel at the bank. If

I understand it right, that's the way it is that they opened a change account for us. I don't believe McCrory's requested a change account be open. We just requested change and they opened the change account for us is the way I understand it.

Q. All right sir. Do you know if a specific amount of money was transferred into that change account? A. Well, to my knowledge I don't know. I don't see any statements. As far as I know I don't know.

Q. The answer to the question is that you have no knowledge of whether any money was put— A. That's right.

Q. —into the change account or not? A. That's right. I have no knowledge.

Q. Do you know whether when your store orders change any entries are made at the bank debiting or crediting your account? A. No. I see no statements on anything.

Q. Did Mr. Charles Futch, an employee of the First National Bank, come to see you after I did— A. Yes.

Q. —on March 29? A. Of course, he's been out to see me several times; but he came out to see me after you were there too, yes.

Q. Did he come out to see you specifically in connection with these arrangements? A. He came out to see if I understood the operations of the bank messenger service.

Q. Did you telephone to him after I had come to see you? A. Did I telephone to Charles Futch?

Q. Yes or to anybody at the bank? A. I telephoned to Mr. Rickerts after you were there telling him you had been in to see me.

Q. And Mr. Rickerts is the president of the bank? A. Yes.

Q. And then it was after your telephone call Mr. Futch came out? A. Oh, quite awhile after. I called him the same day to tell him that you had been in there asking questions about the banking procedure for his bank.

Q. Before I was out there to see you on March 29th, did, so far as you know to your knowledge and recollection, did any representative of the First National Bank ever tell you that the messenger, Mr. Meriwether, in taking money back and forth, was acting as agent for McCrory's? A. To my knowledge I don't remember it; but they had explained certain things to me. I want to make that clear. I mean I did know how to put the money in the bank and I did know how to make out a deposit slip; and in the course of it, I may have just remembered the things that pertain to me that I wanted to remember.

Q. Well, I understand that, but— A. I did go down to the bank and open the account up and signed and I talked with—I didn't talk to Mr. Meriwether, I talked with Mr. Charles Futch and Mr. Leon—

Q. Pelham? A. —Pelham, right, before the store even opened and that's when I got the key and the forms to use and the bags, et cetera.

Q. Well, with that background and explanation, to your knowledge or recollection did anyone ever tell you Mr. Meriwether was acting as agent of the bank? A. No, I don't remember that until this all was brought up.

Q. And calling your attention to this other pink sheet—

MR. SMITH: Which I will ask the Reporter to mark as Exhibit B in connection with this deposition.

(Whereupon, Defendants-Intervenors Exhibit B was marked for identification.)

(Exh. B Not Printed)

BY MR. SMITH:

Q. Is it true that prior to the time I came out to see you on March 29th that you understood that Exhibit B was a receipt for money which you were receiving? A. That's what I understood. Yes because that's what I understood. I didn't read all the print. I just looked at the money and signed it and I got a copy and Bill took a copy and I assumed I was just signing a receipt for the money to take care of him that I received the money.

MR. SMITH: All right. No other questions.

Examination by Mr. Edwards

Q. Mr. Baker, when you went into the bank to make arrangements for these services, were you talked with at length about the services? A. Yes. They explained it to me. I mean, yes, I sat there quite awhile because it was something new.

Q. Is your testimony then that they did not tell you that this messenger service was acting as your agent or that you don't remember? A. Well, I don't remember because all I was concerned about was getting McCrory's store open. We were under pressure to get it open on the 15th to meet Grants opening and we were working night and day and the only thing I wanted to know was how was I going to put my daily receipts in the bank.

Q. Have you testified to the effect that they did not explain this to you? A. No, I testified to the effect that I don't remember if they did.

Q. You did sign a dual control agreement similar to the one Mr. Smith exhibited to you and identified as Exhibit C? A. That's for giving them permission to open the bag at the bank, yes.

Q. You signed that agreement? A. Yes, because I had to check to see if I could. I had to talk to my comptroller

to see if it was all right if they opened my bag if I wasn't there and the bank said there would always be two employees present and the comptroller said it would be all right.

Q. Did they explain to you the procedure they would follow when they opened up the bag? A. I remember they said there would always be two employees that would count the money and they would verify the receipt we had in the bag and on the truck's next visit to the shopping center they would drop my bag off with a receipt in it stamped that we had the money in there.

Q. Were you given to understand that your deposit to the bank became effective after this verification? A. Yes.

MR. SMITH: Objection, leading, move to strike.

BY MR. EDWARDS:

Q. Your answer was yes to the question? A. Yes, Until the thing is stamped, I understand I haven't got any verification the money is in the bank until the receipt is stamped.

Q. In the event that there is a shortage in the bag between the actual count of the monies and that which is shown on the transmittal slip, whose responsibility is that?

MR. SMITH: Objection, calls for a legal conclusion.

MR. EDWARDS: He can testify as to what his understanding of it is as to whose responsibility it is.

MR. SMITH: You didn't ask him that.

MR. EDWARDS: All right.

BY MR. EDWARDS:

Q. What is your understanding in that instance as to whose responsibility it is? A. If the bag is short?

Q. Yes. A. Part of the money is not there you mean?

Q. Yes. A. I would understand the store would be responsible.

Q. And not the bank? A. No, not the bank. We make mistakes.

Q. When Mr. Meriwether brought this change to you on 4/4/67, what did you give him when he came in the store? A. $68.

Q. And how did you give it to him? A. Well it would have been all in paper money I would imagine. I don't remember whether there was any change in it or not. I can't remember that.

Q. Was it accompanied by Defendant's Exhibit A? A. Yes.

Q. Previously marked in this deposition? A. Yes.

Q. So you handed him $68 in money and this messenger transmittal slip? A. Yes. I kept this copy. I filled this one out myself and he kept the other copies.

Q. Have you delivered monies to him on other occasions? A. Money to Mr. Meriwether?

Q. Yes. A. No. I've never given him any money at all that I haven't—other than when he brings me change, then I give him the same money. I've never given him any money.

Q. And this is in cash with one of these transmittal slips? A. Yes.

Q. Is this your practice always? A. No. Sometimes we put money in the bag.

Q. Let me put it this way: Whenever you have ordered change and he brings it to you without your previously having sent money, has this always been your practice? A. Yes. There's always been these forms.

MR. EDWARDS: All right. No further questions.

Examination by Mr. Smith

Q. You were asked a question by Mr. Edwards about your understanding pertaining to verifications. A. Understanding of the verification?

Q. The verification of your deposit. A. Yes.

Q. Had you given any thought to the matter and did you have any understanding of it prior to the time I came out? A. You mean when my money actually became —when I had the verified receipt you mean?

Q. Yes. A. I don't think we ever talked about that.

MR. SMITH: All right. No other questions.

A. But I understand when it's stamped, that's when I've got proof. Until then I don't have anything.

BY MR. SMITH:

Q. You mean proof of your deposit? A. Yes, until the teller or whoever stamps it, I couldn't prove I put the money down there actually until I get that.

Q. Except from the copy that you keep. A. Yes, but I could make up copies all day long, you know I have to forward a verified copy to the home office. They won't just take a copy.

Q. I understand. All right.

MR. SMITH: I have no further questions.

MR. EDWARDS: No questions.

MR. SMITH: Mr. Baker, pursuant to the Federal Rules of Civil Procedure you have a right to read and sign your deposition after it's been written up by the Court Reporter in the English language. The purpose of this is to correct any errors which she might have made in taking the deposition, not to change any testimony you've given.

In the alternative you have the right of in effect relying on the Reporter's accuracy and waiving the reading and signing.

If you desire to read it and sign it, it will be necessary for you to make arrangements to obtain a copy of the deposition and then read it and sign it in her presence. We would like to know whether you wish to read and sign or whether you would waive.

You want to go off the record?

MR. EDWARDS: No. On the record I disagree with the fact that he's got to make arrangements. I think the deposition has got to be presented to him.

MR. SMITH: Well all right. Arrangements have to be made. Let's go off the record.

(Whereupon, a discussion followed off the record.)

THE WITNESS: I'll waive it, yes.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of this deposition by the witness be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing also be waived.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF ELLIOTT ALEXANDER TELFORD, JR.—FILED APRIL 24, 1967

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The deposition of ELLIOTT ALEXANDER TELFORD, JR., taken by counsel for Defendants-Intervenors on the 19th day of April, A. D., 1967, beginning at the hour of 11:20 o'clock a. m., at 107 South Evers Street, Plant City, Florida, before Thelma Helene Dreyer, Notary Public in and for the State of Florida at Large.

Thereupon the said

ELLIOTT ALEXANDER TELFORD, JR.,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Will you state your full name, please, sir? A. Elliott Alexander Telford, Jr.

Q. Where do you live, Mr. Telford? A. 1016 Russell Drive, Plant City.

Q. What is your age? A. Thirty-one.

Q. What is your occupation? A. Store manager, W. T. Grant Company.

Q. Is that business located at Plant City Plaza here in Plant City? A. Yes.

Q. How long have you been store manager of that business? A. This particular store?

Q. Yes. A. Since it opened on October 13th.

Q. 1966? A. Six, right. That's not really true. You want to backtrack there a second. It was August not

October. We opened in October not August as far as the court records goes.

Q. Does Grants—is Grants a customer of the First National Bank in Plant City? A. Yes.

Q. Does it make use of the off-premises receptacle or depository which is located at Plant City Plaza? A. Yes.

Q. Does it make use of the armored car service offered by the First National Bank? A. Yes.

Q. Could you tell me how long it has been using those services? A. Since we opened and shortly prior to that for monies that we might have used prior to opening, receiving freight and what have you.

Q. Who made the arrangements or who signed the documents is what I want to know in behalf of Grants pertaining to these services? Did you or was that done at some other location? A. All of our banking—all of our banks for any store are set up by our New York office.

Q. Do you have authority to contract in behalf of Grants?

MR. EDWARDS: Objection. I direct the witness not to answer the question on the basis it calls for a conclusion, a legal conclusion of the witness.

MR. SMITH: You can't direct the witness not to answer when he's not your client.

MR. EDWARDS: I agree with you on that, but I object on that basis.

BY MR. SMITH:

Q. I don't want a legal conclusion, sir. Companies customarily advise their employees or the manager whether they have authority to sign contracts; and I just want to know if you've been advised one way or the other. A. I honestly don't know.

Q. You can't recall any specific directions one way or the other from your organization? A. No.

THE WITNESS: Do you want me to elaborate on that, Bob?

MR. EDWARDS: On the record, Mr. Telford, at this point you've been called by Mr. Smith as his witness to give testimony and I cannot in any way suggest to you anything or anything of this nature.

THE WITNESS: All right.

MR. EDWARDS: You must give him whatever is an honest answer to the question.

THE WITNESS: All right.

BY MR. SMITH:

Q. It is further assumed, Mr. Telford, that you are here as a citizen of the United States under oath and not involved in this lawsuit and you are to give the information and not take sides. A. All right, sir. Anything you want to know.

Q. Do you have personal knowledge, sir, of the procedures which are used by Grants in making use of the off-premises receptacle or depository? A. Ask me that again. I don't understand you really.

Q. Do you know of your own personal knowledge and information what procedures your organization goes through in placing money into the off-premises receptacle or depository? A. Yes I do, Mr. Smith.

Q. How long have you been acquainted with these procedures? A. Since we have used them.

Q. Would you tell me how Grants makes use of the off-premises receptacle or depository? A. Yes. Any deposit that we make is dropped in the receptacle which is two doors from the store.

Q. And is this done routinely on a daily basis or several times a week? A. Every day.

Q. Does it include Saturday receipts? A. Yes.

Q. And do you use a canvas bag in connection with the operation? A. Yes.

Q. And was this bag supplied by the Bank? A. Yes.

Q. So far as you know did you pay the bank anything for the bag? A. No, not to my knowledge.

Q. Do you have a key which gives access to the depository? A. Yes.

Q. So far as you know did you pay anything for the key? A. No.

Q. Located at the depository are—is a stand and some materials which may be used persons including some green envelopes and some slips called transmittal slips. Does Grants make use of those envelopes or does Grants just use the canvas bag? A. Just the canvas bag.

Q. Does Grants include in the bag with its receipts or attach to the bag containing its receipts any sort of slip which goes to the bank? A. Yes, a deposit slip.

Q. I want to show you a form attached to an affidavit of Mr. Rickerts identified as Exhibit B and ask you to look at that form and tell me if thats the kind of slip which you enclose with the bag. A. Yes it is.

Q. Now, do you know if your organization or did you either one sign any particular document when you began to use the services of the bank, the depository services I mean? A. We would have had Mr. Mayer sign, our vice president in New York in charge of finance; but as I told you before all original bank setups are made through our New York office.

Q. I show you another document attached to Mr. Rickert's affidavit marked Exhibit A which is entitled Comprehensive Dual Control Contract.

Did you or anyone locally ever execute one of those documents? A. I'm pretty sure that I didn't, but I'm not positive.

Q. All right sir. You have no recollection of doing so? A. No. I sure don't. Here again this is something he would sign.

Q. Now, calling your attention again to Exhibit B attached to Mr. Rickert's affidavit, the messenger transmittal slip, on the reverse side there is a contract or an agreement. Do you see it? A. Yes.

Q. Do you recall when I came out and talked with you on March 29, 1967? A. Yes I do, Mr. Smith.

Q. As of that time had any representative of the First National Bank explained that contract or agreement to you? A. No.

Q. Had you read it before that time? A. No.

Q. Does your Plant City store make requests for money to be delivered from the bank to your store? A. Change.

Q. How do you make that request? A. Either verbally to the man on the messenger service or by telephone.

Q. Are you familiar with the procedures which are gone through when the money is delivered to your store? A. Just roughly, yes.

Q. At the time the money is delivered do you or does someone under your supervision sign any document? A. I don't think so.

Q. At the time the change is delivered to your store, does your store give to the messenger any money in exchange for the change? A. Yes, I'm nearly sure they do.

Q. Is this an amount of money equivalent to the amount of change which is being delivered? A. Yes.

Q. Do you have check writing authority of any sort in behalf of Grants? A. Yes.

Q. Do you know how the change is paid for in effect when it's delivered? Is it done by currency or by check or maybe one way or the other? A. Currency.

Q. Is there any particular reason why your store chooses to pay for it in currency rather than check? A. The check is an agents account for which I pay bills that are due and it is a separate account from our deposit of monies from the store from sales.

Q. Excuse me. Then you have an agents account. A. Checking account.

Q. Checking account. A. Right.

Q. In the First National Bank from which you write checks to pay the bills of the store. A. Correct.

Q. You then have another account, is this correct, sir? A. Right.

Q. In which you make deposit of the receipts of the store. A. Deposits only.

Q. Is this a regular checking account? A. To answer you I'll have to tell you probably very few of our store managers know the actual workings of the account. We could not draw from it. Only the New York office can draw from it. I don't know the balance or anything.

Q. All you know is there is an account there to which your receipts are deposited. A. Right. This is a company procedure.

Q. Now, is there a third account also maintained for the handling of this change? A. No.

Q. Do you know if your store— A. Not to my knowledge. Excuse me.

Q. Have you heard the term change account used in connection with the delivery of money on your order? A. No. In fact, I never thought about it until you asked the question.

Q. All right. Do you know if your organization signed any document or agreement which would authorize the First National Bank to make a debit to any account maintained in the First National when you order change? A. Not to my knowledge. They could have though. I don't know.

Q. Well as I understand as far as you know there are only the two accounts down there. One of them is the agents accounts from which you pay bills. A. Yes.

Q. And the other is the receipts account into which you put receipts of the store. A. That is correct. There should be only those two.

Q. And you don't have authority to draw against the receipts account. A. Definitely not.

Q. But you do have authority to draw against the agents account. A. Right.

Q. When the change is delivered to your store pursuant to order, is it necessary for you or representatives of your store to sign anything? A. I'm not quite sure, Mr. Smith. My cashier could answer you positively on it. I don't think so. It's kind of silly that I haven't asked them.

Q. Is your cashier named Mary Davis? A. That is correct.

Q. Are you aware of any document which any representative of your store has signed which authorizes the First National to debit an account of Grants when you order change? A. No, I'm not aware of it.

Q. Have you yourself authorized anyone working with your store to in turn authorize the First National to debit an account of Grants when money is ordered? A. No, not unless our New York office has done so.

Q. But you have no knowledge of such authority? A. No.

MR. SMITH: I have no other questions.

Examination by Mr. Edwards

Q. Mr. Telford, do you personally supervise the relationship between the bank and the making of—up deposits and so forth coming from your store? A. Yes. I would naturally supervise.

Q. Do you have knowledge of what transpires or does this transpire through your cashier as you testified earlier? A. It's strictly through my cashier although I see the deposit slips each day of how much was put in.

Q. Do you know what the arrangement with the bank is concerning the handling of the monies that's dropped into the receptacle that's maintained at the Plaza? A. Do I know what their procedure is?

Q. Yes. A. Yes.

Q. Could you tell me what it is? A. We make a deposit through one of our bags, in one of our bags, put it in the receptacle. It is picked up by the armored car messenger service and taken to the bank for deposit into our account.

Q. When do you receive a deposit slip? A. The following day.

Q. Do you know when this money is accepted by the bank for deposit?

MR. SMITH: Objection, calls for a legal conclusion.

MR. EDWARDS: I asked him if he knows when it is accepted.

BY MR. EDWARDS:

Q. The objection is noted. You may answer the question. A. When it reaches the bank.

Q. Do you ever receive a deposit slip validated as a deposit from the bank prior to the time that the money reaches the bank? A. No. It would be impossible wouldn't it?

Q. When you stated a moment ago that you put a deposit slip in the bag, you were referring to the canvas bag used to carry funds to the bank, is that right? A. Yes.

Q. Whenever—what do you understand that slip consists of? A. Checks and currency that we would deposit into our account.

Q. And what kind of a slip is it? A. A deposit slip similar to any that we've ever used in any other bank that I've used.

Q. Could you tell me whether or not this Exhibit B attached to Mr. Rickert's affidavit fairly represents the slip which is used? A. Yes. It is the one.

Q. Are all monies that are transmitted to the bank transmitted by the use of this particular document designated Exhibit B? A. It is always a white one such as shown on Exhibit B.

Q. Do you receive or have you in the course of your banking business received debit notices from the bank to the account which you are authorized to sign on from time to time? A. Now, you'd have to ask me which account. There are two accounts.

Q. Any account. A. From our agent account, yes.

Q. So that they do send you a debit advice from time to time. A. Yes.

Q. Do you honor those debit advices when they come in?

MR. SMITH: What do you mean honor them?

A. I don't follow you.

BY MR. EDWARDS:

Q. Well, the debit advice is the advice to you an account has been debited for a certain amount of money. A. A service charge?

Q. That or for any other particular reason. It's noted on the face of it, is that right? A. Yes. We write a check for the service charge.

Q. Whenever the debit advice comes in, it is honored or if you disagree with it, you take it up with the bank? A. Sure.

Q. Otherwise it goes through with the normal course of business? A. Yes.

Q. Is this a usual banking relation that you have with banks where you've been in charge? A. It's the same as any eight or ten banks that I've used in managing other stores, assistant manager, although our agent account is new—for about a year. We've had that in for about a year.

MR. EDWARDS: I have no further questions.

Examination by Mr. Smith

Q. Do you get monthly statements on both of these accounts? A. No.

Q. Or do they go to New York? A. Only on the agent account.

Q. You get a monthly statement only on the agent account? A. Right.

Q. And you mentioned that you receive debit notices. Am I correct that you receive these only in connection with the agent account? A. Right. The other account is handled through New York. I don't even know the balance of it.

Q. When your store sends money in the bag or puts money in the bag to be put in the depository, do you retain a copy of this Exhibit B? A. Yes. You asked me if I retain a copy—I send it to the New York office. That's our procedure.

Q. What I meant was you keep one which bears the initials— A. Yes.

Q. —of the armored car messenger. A. Yes.

Q. Down at the bottom of it and you take that and mail it on up to New York? A. Yes.

MR. SMITH: No other questions.

Examination by Mr. Edwards

Q. Mr. Telford, do you in fact mail to New York the copy that you retain or the one that is returned to you after having been validated by the bank? A. We have two copies of it, Mr. Edwards. We mail a copy to New York and I'm nearly positive we keep one also. Here again Mrs. Davis can answer you.

Q. So you don't really know whether you mail the validated one or the initially retained one to New York? A. I do not know which one.

MR. SMITH: Mr. Telford, this deposition is taken pursuant to the Federal Rules of Civil Procedure. Pursuant to those rules you have a right to read and sign this deposition after it has been written up in the English language by the Reporter. The purpose of this is to correct any errors she might have made in taking your testimony. In the alternative you may waive the reading and signing. If you elect to read and sign it, it will be necessary for you and the Court Reporter to get together for that purpose.

We'd like an expression from you as to whether you wish to read and sign or will you waive?

Let's go off for a minute.

(Whereupon, a discussion followed off the record.)

THE WITNESS: I'll waive then.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

(At 1:45 p.m. the witness Elliott Alexander Telford, Jr. was recalled to the deposition on the same date and at the same place set forth hereinbefore. All persons hereinbefore noted were present.)

MR. EDWARDS: Would you now allow us to add on to the end of the deposition?

Let the record show Mr. Telford was recalled to the deposition at the request of Edwards, Counsel for the Plaintiff First National Bank, reminded that he was still under oath.

Examination by Mr. Edwards

Q. Mr. Telford, I asked you if since you finished testifying in the deposition earlier today you have had occasion to examine a document entitled Comprehensive Dual Control Contract upon which there appears the words "W. T. Grant Company, number 489," and following that is "E. Telford" on the line designated depositor. A. Yes.

Q. Could you tell me whether or not you signed that document entitled Comprehensive Dual Control Contract? A. Yes, I did. That's my signature.

Q. You will note that it was signed on October 14, 1966. Do you have any explanation as to why you were not able earlier to remember signing it? A. Ordinarily we don't sign these types of contracts. Mr. Mayer would handle them, but on this particular day, it was the day after opening of the store, and probably in the turmoil that we had going on at that time I'm sure there are probably a lot of things I don't remember signing.

Q. Did you have authority to sign it? A. Yes.

Q. And is this the contract under which the store has operated to your knowledge? A. Very honestly—not having remembered signing it—

Q. The answer is you don't— A. The answer is yes; but, of course, I didn't remember signing it until I saw it.

Q. Now, one further question, Mr. Telford. You had testified that you do have authority to check on funds belonging to W. T. Grant in the First National Bank of Plant City.

MR. SMITH: What do you mean check on? Draw checks you mean?

MR. EDWARDS: Yes.

A. On the agents account, yes.

BY MR. EDWARDS:

Q. Could the change obtained by your company just as easily have been worked through this account as through the special account which was testified to by Mrs. Davis?

MR. SMITH: Object, speculation. It's not fact.

A. No. It is a fact because it could, yes. We could put anything in there we wanted to, Mr. Smith, as far as— that's what it is for. It is for anything that we might pay at the store.

BY MR. EDWARDS:

Q. So that this account you do have authority over. A. Yes. No one signs it but me or Mr. Mayer who could write checks on it. There's a signature card with his and my name on it for that account as is true in all of our stores now.

Q. So that a debit to that account over your signature or any authorized signature is permissible, is that true? A. Yes.

MR. EDWARDS: I have no further questions.

Examination by Mr. Smith

Q. From whom did you obtain the authority to sign the Comprehensive Dual Control Contract? A. This contract?

Q. Yes, sir.

MR. SMITH: Show the hesitation please.

A. Being that I am the store manager, I just simply signed it.

BY MR. SMITH:

Q. Well, you testified that you had authority or obtained authority to do it. Now, my question is— A. I am sure, Mr. Smith, that I am liable for anything that might come up concerning this.

Q. I'm not asking you for a legal conclusion, Mr. Telford. I'm simply asking you who gave you the authority. A. Who gave me the authority—no one gave me the authority as far as giving authority is concerned. I can sign a lot of things no one has actually given authority for. I sign every order that goes out of the store just to answer your question. That's all.

Q. You did not have specific authority from anyone to sign this document? A. Not that I recall, no.

Q. All right. Now, as I understand the last series of questions Mr. Edwards asked to you, you're saying that when you order change, a debit for that order could be made against the agent's account. Is that what you're saying? A. I would have to write a check for it if that be the case and a deposit would have to be made to put it into this account.

Q. Is that in fact what you have done? A. Oh, no.

Q. Have you in fact given the bank authority to debit against the agents account? A. No.

Q. Has the bank in fact debited against the agents account? A. No. Our change doesn't come through the agents account.

MR. SMITH: All right, sir. No other questions. Just a minute. I have one other question.

Examination by Mr. Smith

Q. Mr. Telford, attached to the document that you brought with you here—well, first I want to ask you about this Comprehensive Dual Control Contract. Did that come from your office? A. Oh, no. It was presented to me by Leon Pelham at the bank.

Q. Well, where did you get this particular document today? Did you have it out at Grants or did Mr. Edwards give it to you? A. Mr. Edwards gave it to me.

Q. Did Mr. Edwards call you to come back and testify about it? A. Yes.

Q. Now, attached to it is something entitled "Questionnaire for Bank Messenger Service". A. Right.

Q. What is that? A. Well, just what it says. Questionnaire for bank messenger service asking when I wanted the service as far as change.

Q. Did you supply the information on it? A. The very little bit that's on there, yes.

Q. Is that your writing? A. Yes, it is. That is my writing.

MR. SMITH: Let the record show that the questionnaire for bank messenger service has never been produced pursuant to the motion to produce.

MR. EDWARDS: Would you read that.

(Whereupon, the Court Reporter read the following:)

"Let the record show that the questionnaire for bank messenger service has never been produced pursuant to the motion to produce."

MR. EDWARDS: Let the record also show that Counsel for the Plaintiff does not construe that there has been any order entered directing production of this document.

MR. SMITH: I think we better also show that pursuant to the testimony taken here at this time it will be marked as Plaintiff's Exhibit number one in connection with Mr. Telford's deposition.

MR. EDWARDS: No. I'm not ready to put this in. It's our original record and we can't let it go out of the bank at this point. If you want to subpoena it, you can get it. I don't purport to identify it as such except that he admits he signed the dual control contract. I have not tendered it for the record.

MR. SMITH: Bob, what you have done here is show him the document and refresh his recollection from the document and have him identify that that's the document he signed and the document is the best evidence.

MR. EDWARDS: And he's now testified from his best recollection that he did in fact execute such a document and this is the testimony that's in the deposition.

MR. SMITH: All right. Well, I move to strike the testimony of Mr. Telford given after lunch on the ground that the document identified is the best evidence and Counsel refuses to offer it in connection with the proceedings.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF RICHARD D. ELSTON —FILED APRIL 24, 1967

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Deposition of RICHARD D. ELSTON, taken pursuant to notice this 19th day of April, 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at 107 South Evers Street, Plant City, Florida, beginning at the hour of 2:45 o'clock P. M.

Thereupon the said

RICHARD D. ELSTON,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Would you state your full name, please? A. Richard Don Elston.

Q. What is your residential address? A. 513 Pevetty Drive.

Q. In Plant Drive. A. Plant City.

Q. What is your age? A. I'm thirty-four.

Q. What is your occupation or profession? A. I own the Elston Insurance Agency, Incorporated.

Q. Are you or is your company a customer of the First National Bank in Plant City? A. Yes, both of us.

Q. Do you or does your company own any interest in the First National? A. None.

Q. In connection with either your personal affairs or your corporate affairs, do you maintain an account or accounts at the First National? A. Well, I do personally and I do for the corporation both.

Q. You have both a personal account and an account for the corporation? A. And the agency has one too.

Q. Do you have more than one personal account or more than one business account? A. No, just one personal account and one for the agency.

Q. One agency account. In connection with either your personal business or in connection with the business of your agency, do you use facilities of the First National which are sometimes described as the armored car service? A. No, we've never used the armored car service.

Q. Do you use the depository or receptacle at the Plant City Plaza? A. Yes, the agency does.

Q. How long have you made use of that service? A. I'd say pretty close to the inception of the service.

Q. Now, where is your agency located? A. It's located at 416 North Alexander which is approximately from the south side to the west side of the depository at the shopping center.

Q. Well, Alexander is to the west side of downtown Plant City. A. That's right.

Q. Near the Baptist Hospital? A. That's right.

Q. And I would guess roughly about 15 blocks west of the center of town? A. That would be pretty close.

Q. And the depository is about a mile south— A. Of town.

Q. —of the center of town, isn't it? A. Yes.

Q. In what manner do you make use of the facility of Plant City Plaza? A. Well, the reasoning behind it is that we stay open on Saturdays till noon and, of course,

we have late Friday receipts plus all Saturday morning's receipts which usually are pretty good; and since we've been robbed about four times in our agency, we're very cautious about leaving loose change and checks, so it's been a very good service for us because we can take them there and that will be safekeeping over the weekend.

Q. When you say you've been robbed. You mean your agency offices have been broken into? A. Yes.

Q. And money stolen from it? A. Yes.

Q. When you've left it there overnight? A. Yes.

Q. Do you have a safe there in your office? A. No. No. We make a daily deposit and on Saturdays we deposit all we can, put it in this Plaza shopping center there.

Q. Do you use the Plaza shopping center at any times except on the weekends? A. Rarely. Some, but it's normally for weekends.

Q. Would your normal practice be to take the agency receipts— A. Yes.

Q. —and go down to the bank and deposit them in the bank each day? A. Yes. We make a daily deposit at the bank.

Q. And then on the weekends or perhaps on other rare occasions. A. Holidays.

Q. Holidays, you place your funds in the depository or receptacle at Plant City Plaza? A. That is correct.

Q. Does the First National Bank have a so-called drive-in facility or a night depository adjacent to its main banking house on Haines Street? A. Yes. I'm quite sure they do, but this one at the shopping center we usually double it up with shopping. See, my dad actually makes the deposit and what happens is he can go over there and make a deposit while my mother shops. It's been very convenient for him; and plus I feel there's a greater de-

gree of security there rather than going by the bank because it's isolated compared to the shopping center.

Q. Well, then, the reasons that you use the facility at Plant City Plaza rather than the night depository adjacent to the main banking house is one for the convenience of your father. A. Yes.

Q. And two because you think it's a more populated area than where the night depository— A. It offers a little more security, that's right.

Q. Do you recall how long you have been making use of the facility at Plant City Plaza? A. Pretty close to the inception of the facility when it was built there.

Q. Do you recall whether you signed any documents when you decided to start using it? A. No, I didn't and my dad may have, but I doubt it. The only thing they gave a different type of deposit slip after we started using it where they had a triplicate copy rather than a duplicate. We realize that our receipts were not posted until the next banking day. Now, he may have signed something, but I don't know of anything.

Q. I want to show you for the record a copy of a document which we call Exhibit A attached to Mr. Rickerts' affidavit. The document is called a Comprehensive Dual Control Contract. Do you remember whether you signed one of those? A. No, I did not. However, as I said, my dad keeps the books and makes the regular routine deposits. So he may have but I did not.

Q. I show you Exhibit B attached to the same affidavit which is a slip called messenger transmittal. A. That's what we use.

Q. Is that the kind of slip you use? A. That's the kind of slip I was talking about. It's in triplicate rather than duplicate. We use those.

Q. In placing your funds in the facility at Plant City Plaza, do you place them in a canvas bag which is locked

or do you know? A. I don't really know, but—I really don't know. I'm assuming that it is, but I just don't know. I don't know. I mean, Dad does it and I really don't know.

Q. Would you be unable to testify from personal knowledge what mechanics your agency does go through? A. As far as that Plaza would be, yes. I know he and I agreed to use it and he's the one who's been making the deposits personally.

Q. And you've never used it yourself? A. No, sir.

Q. And there are also some green envelopes which are sometimes used like the one I hold in my right hand. Would it be fair to say you don't know whether your father uses one like that or not? A. No. I'm not familiar with that.

Q. Do you have any occasion to ask the First National to deliver money to your place of business? A. No. Like I say, you know, Dad is actually semi-retired.

Q. Yes. A. And part of his duties is liaison with the banking facilities so he takes care of that. He and I talked recently about a Saturday delivery because we do get caught short sometimes and we were contemplating using the messenger service.

Q. Have you up to this time? A. But we have never used it before, no, nor to this date have we used it.

Q. Have you talked to any bank officials about the possibilities of using it? A. Yes. I asked them what the actual facilities were, what was involved, what the cost was or may be. In other words, I inquired about it.

Q. When was this? A. I'd say about ten days ago.

Q. Did someone contact you about the possibility of your appearing here today as a witness? A. No.

Q. Did someone ask you whether it would be appropriate for the First National to furnish your name to me

as a possible witness? A. I was asked if my name could be used that I was in favor of the facility, that it was a service to my agency and to this I said yes. That was the extent of my invitation.

Q. Who asked you? A. Mr. Futch.

Q. When was this? A. About the time—about the same day I inquired about the messenger service.

Q. About ten days ago? A. About ten days ago.

Q. In asking whether your name could be furnished, did you contact him or did he contact you? A. No. We were talking about some other business involved, personal and banking business and this came up. He said, "I notice you are using the Plaza service," and I said, "Yes," and I said, "Dad and I are talking about the messenger service and what are the facilities," and then went into the mechanics of it.

Q. This was quite recently? A. Yes.

Q. Now, when you put your receipts in the depository or receptacle at Plant City Plaza, do you know, of your knowledge, what is done with them? A. No. The only thing that we were instructed—Dad received notice and I was the one that happened to be in the bank when the deposit slips were made up with our account number that did we realize that money did not—that the money was not credited to our account until the next banking day which in our case was Monday or Tuesday and we said yes that was no problem for us because we used it more as safekeeping for us.

Q. When you drop your money into the depository or receptacle at Plant City Plaza, you don't follow it any more or check on it until you get your bank statements? A. No. We receive this triplicate copy, the second copy of the triplicate showing it has been credited to our account.

Q. Then you get a bank statement the end of the month showing the amounts? A. That's right.

Q. I don't remember if I asked you this or not. How long have you been a customer of the First National? A. Close to the time it started which has been close to ten years.

Q. You personally or the agency? A. Both, and my father moved his account there also at the same time.

MR. SMITH: I have no further questions.

MR. EDWARDS: No other questions.

MR. SMITH: You have a right to read this deposition after it's written up in the English language by the Court Reporter and then to sign it. The purpose of this is to correct any errors she might have made. You can, if you wish, waive the reading and signing of it, but we would like to know now whether you will waive the reading and signing.

(Whereupon a discussion followed off the record.)

THE WITNESS: Yes. I'll waive it.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF LEROY RENFROE —FILED APRIL 24, 1967

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Deposition of LEROY RENFROE, taken pursuant to notice this 19th day of April, 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at 107 South Evers Street, Plant City, Florida, beginning at the hour of 2:30 o'clock P. M.

Thereupon the said

LEROY RENFROE,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Would you state your full name, please? A. Leroy Renfroe.

Q. Where do you live? A. I live on Moors Lake Road at Dover.

Q. What is your business or occupation? A. Well, I'm the postmaster. Also, I'm the owner of a supermarket at Dover.

Q. In connection either with your duties as postmaster or your business, are you a customer of the First National Bank in Plant City? A. Yes, sir.

Q. Are you a customer as a postmaster as well as a grocery store operator? A. No, just as a grocery store operator.

Q. How long have you been a customer of the First National? A. About seven or eight years.

Q. Do you own any interest in that bank? A. No, sir.

Q. Do you have any members of your family who are employed by the bank? A. No, sir.

Q. Do you make use of a service which the First National Bank operates and offers which is called the armored car service? A. Yes, sir. I believe they stated it was a bank messenger service rather than titled armored car service.

Q. Well, all right, sir. Bank messenger service. A. Yes, sir.

Q. You do make use of it? A. Yes, sir.

Q. Just so we'll have it straight on the record, there is also out at Plant City Plaza a depository or receptacle where people drop money into the receptacle out there.

You don't use that service in connection with your business, do you? A. No, sir.

Q. Have you ever had occasion to use it at all? A. No, sir.

Q. Now, do I correctly understand that the service which you do use is one whereby the receipts from your grocery business are transmitted to the bank and whereby monies from the bank are delivered to you? A. Yes, sir.

Q. Now, how frequently does the armored car call at your place of business? A. Daily.

Q. Six days a week? A. Yes, sir.

Q. And you transmit the receipts from your business to the bank by virtue of the armored car service, is that right? A. Yes, sir.

Q. What sort of procedure do you go through? A. Now, I have what I think you would call a deposit book. I think I make four copies of it.

Q. All right, sir. A. When the bank messenger comes by and picks up my money, he gives me an initial receipt for the money that I give to him, money or checks.

Q. And do you put these in a bag of any sort? A. Yes, sir, in a bag with a lock on it.

Q. Is this bag furnished you by the bank? A. Yes, sir.

Q. Do you have any clear, definite recollection of whether you paid anything to the bank for the bag? A. I just don't know whether I did or not. I do know that my night deposit bag that I first got that I paid for it or for the—for the privilege of using the night deposit. I don't know—I couldn't tell you how much it was, though.

Q. Do you remember how you paid it? Was it in cash or charged to your account? A. It was charged against my account. This is years ago when I first started using the night deposit.

Q. Oh, you're talking about using the night deposit down here in Plant City? A. Yes, sir.

Q. Well, did you get a new bag when you started using the armored car? A. Well, I didn't get a new bag. I got another bag so that I could have two bags.

Q. Do you remember if you paid anything for that other bag or not? A. Mr. Smith, I don't remember if I did or not.

Q. I want to show you a copy of an agreement here which we lawyers call Exhibit A attached to Mr. Rickerts' affidavit which is entitled Comprehensive Dual Control Contract. Do you recall whether or not you signed one of these when you started using the messenger service? A. Yes, sir, I did.

Q. Now, do you recall who signed it? Did you yourself sign it? A. I, myself, signed it.

Q. Did anyone else in your organization sign it? A. No, sir. Some more in my organization signed for the privilege of signing for money that was delivered to my store, by this bank messenger service.

Q. Well, now, this document says in this sentence here "Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank messenger for monies delivered to the depositor." Did you otherwise authorize them in writing for someone else to give receipts besides yourself? A. Yes, sir.

Q. Do you remember how you did that? Was it done on a form or just a regular piece of paper? A. I believe, if I remember correctly, I did it on a letterhead, my business letterhead. I typed it out authorizing the bank to let these persons sign for the money and I typed their names on the paper and then had them to put their signature down there.

Q. Do you remember whether at the time that you started using these services whether you received a questionnaire from the bank in mimeograph form on a letter sized paper asking what sort of service you wanted? A. Yes, sir. I believe there was a letter to that effect explaining the service to me and asking how I would best be served.

Q. Did you complete that questionnaire? A. Yes, sir.

MR. SMITH: For the record, Mr. Edwards, I would like to request the production of the questionnaire and also production of the additional letter of authorization.

MR. ERWARDS: With your permission, Mr. Smith, I'll take that under advisement on the same basis. I don't believe the scope of the order is that broad, but I prefer to read the order before I decline to furnish it to you.

MR. SMITH: That's fine.

BY MR. SMITH:

Q. Now, when you are preparing your receipts from you business for transmittal to the bank, do you use a form like this one which is identified here as Exhibit B to Mr. Rickerts' affidavit? A. Yes, sir. Mine has my business name—

Q. On the left-hand side? A. On the left-hand side, yes. I believe it's on the left-hand side here.

Q. Could you tell us whether it is otherwise like that form? A. Yes, sir.

Q. And when you deliver your canvas bag with your receipts and this transmittal slip to Mr. Meriwether on the armored car, does he initial down here at the bottom where it says receipt of messenger showing that he's received the bag? A. Yes, sir.

Q. And does he give you a copy of that? A. Yes, sir.

Q. And he takes the other copies with him to the bank? A. Yes, sir.

Q. Now, then, do you get back from the bank a copy with a stamp on it of the transmittal slip which you've sent to them? A. Yes, sir, on the next delivery or the next time I get my bag back, I'll have a certified copy of the deposit that I have made.

Q. And do you get one or two copies? A. One.

Q. What do you do with your copy? A. With my copy?

Q. Yes, sir. A. I keep it with my deposits so I can check out my bank books.

Q. For your accounting purposes? A. Yes, sir.

Q. Now, how do you order change when you want change delivered to you? A. I call to the bank.

Q. I understand that the bank has a service whereby you call in and leave a message on a recording as to what

you want and that you can also call during banking hours and leave word with somebody there. Do you do it both ways or— A. Yes, sir. I do it both ways.

Q. Do you ever send a written order for money either by Mr. Meriwether or in your bag as distinguished from calling in for the money? A. I can't remember that I have.

Q. It wouldn't be your customary practice? A. No, sir.

Q. Now, I suppose that—is this correct that when you call in you say this is Mr. Renfroe and you need $50 in change, so much in bills and so much in certain denominations of coins and tell them what you want. Is that the way you do it? A. Yes, sir. I tell them my store name and whose talking and then what I need to operate my business.

Q. All right. Now, how do they get that money to you? After you've given the order, how do they get it to you? A. They bring it to me in this messenger truck.

Q. And what mechanics do you go through when you get the money? A. Well, when Bill brings the money out there—

Q. Excuse me. By Bill, you mean Mr. Meriwether? A. Mr. Meriwether, yes. We open the bag, check it and I sign a receipt that I received that much money.

Q. Do you get a copy of the receipt? A. Yes, sir.

Q. And do you do anything else? A. I don't know as I—

Q. Well, do you give him any money at that time? A. Well, if I have a deposit for him, he picks it up for me.

Q. Well, suppose you had ordered $50 in change pursuant to the example I gave you. When he makes delivery of that $50 in change, do you give him exactly $50 back, either in cash or checks? A. No, sir, not exactly.

Q. But you may give him a deposit to go back in? A. Yes, sir.

Q. You mentioned that you sign a receipt when he delivers the money. Would you look at this document that I call Exhibit C attached to Mr. Rickerts' affidavit and ask is that a sample copy of the receipt which you sign? A. That's it.

Q. Is that like the one you sign? A. Yes, sir, and he leaves me the pink copy so I can keep my records straight out there.

Q. How does, if you draw out $50 and have them deliver it or if you order $50 and have them deliver it, how do you pay them for that $50? A. They charge my account.

Q. Did you sign any agreement with the bank authorizing them to charge your account? A. Well, I understood, Mr. Smith, when I signed up for this service that when I got money by this method that it would be charged to my account when it left the bank; and if I had any monies to deposit to the bank, it would not be deposited to my account until it got to the bank.

Q. Yes, sir, but my question was did you sign any contract authorizing them to do that? A. I can't truthfully answer that.

Q. You don't know one way or the other? A. No, sir.

Q. Of course, you do sign this Exhibit C when you get the money, though? A. Yes, sir.

Q. But you sign that at the time you get the money, is this correct? A. Yes, sir.

Q. Have you ever had an occasion where the amount of money which you ordered in change, just by the circumstances of the moment, amounted to an overdrawal of your account at the bank? A. No, sir, not since we've been on the service.

Q. Have you ever had any occasions where the amount of money which you sent in the bag with the slip didn't jibe with what you'd written on the slip? A. No, sir.

Q. Have you been told by any representative of the bank how the matter would be handled if you happened to order more money than you had on account? A. No, sir. I don't think I'd do that.

Q. Well, my question was have you been told? A. No, sir.

Q. Have you been told what would happen if the amount that you put on your slip differed from the amount which you actually had in the bag? A. I believe that it explained in the contract that that money would be examined or counted by two people, by more than one person. So, then, I assumed if there was an error either for or against me that I would take their—

Q. Take their what, sir? A. Their word for it.

Q. Well, you say you assumed this. My only question was have they ever discussed it with you? A. No, sir.

Q. Have you been contacted by anyone from the First National Bank regarding this hearing we're having here today? A. No, sir.

Q. Do you remember when I chatted with you a moment on Saturday? A. Yes, sir.

Q. You mentioned then that you'd heard from Mr. Futch recently. A. He just mentioned to me that there would be a decision made on this in the near future which I had already heard about it in the newspapers.

Q. Did he call you and tell you that? A. No, sir. It was just through my transactions in the bank.

Q. You saw him in the bank? A. Yes.

Q. And he told you there would be a decision on it? A. Yes, sir.

Q. Was this recently? A. Oh, ten or fifteen days ago.

Q. Did you know that your name was to be given to me so that we could take your deposition today? A. No, sir.

Q. Did you know anything about this deposition before I came by and saw you on Saturday? A. Not a word.

MR. SMITH: I have no other questions.

MR. EDWARDS: I don't have any questions.

MR. SMITH: Mr. Renfroe, you have a right under the law to read your deposition and then sign it after this lady's written it up. You can, if you want to, waive the reading and signing. The purpose of the reading of it, then signing is to correct any errors she might have made. We would like to know whether you'd be willing to waive the reading and signing. If you want to talk to Mr. Edwards about it—

MR. EDWARDS: Off the record.

(Whereupon, a discussion followed off the record.)

THE WITNESS: All right. I'll waive it.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

DEPOSITION OF LEON J. SOUTHER —FILED APRIL 24, 1967

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Deposition of LEON J. SOUTHER, taken pursuant to notice this 19th day of April, 1967, before Thelma Helene Dreyer, Court Reporter and Notary Public, in and for the State of Florida at Large, at 107 South Evers Street, Plant City, Florida, beginning at the hour of 2:00 o'clock P. M.

Thereupon the said

LEON J. SOUTHER,

being first duly sworn to testify the truth, the whole truth, and nothing but the truth, was examined and deposed as follows:

Examination by Mr. Smith

Q. Mr. Souther, will you state your full name, please? A. Leon Jackson Souther.

Q. Where do you live? A. Dover, Florida.

Q. What is your business or occupation? A. Supermarket owner.

Q. What is the name of your business? A. Dover IGA Food Line.

Q. How long have you operated that particular business? A. It will be six years June 18, 1967.

Q. Mr. Souther, are you a customer of the First National Bank in Plant City? A. Yes, sir.

Q. In connection with your business, do you make use of an armored car service which the bank operates? A. Yes, I do.

Q. Now, there is out at Plant City Plaza here to the south of town a facility inside the building which we call an off-premises depository or receptacle where people can put bags of money or envelopes into the receptacle. Do you or have you ever used that particular facility? A. No. I'm not familiar with that facility at all.

Q. All right, sir, but you do make use of an armored car service which the First National Bank operates? A. Yes, sir, I do.

Q. How long have you made use of that service? A. From the very beginning of the service was offered.

Q. Some time in, would it be about October, 1966? A. I couldn't say really. I could check my records, but I can't recall from memory. It was some time during the fall of '66.

Q. All right, sir. Now, would you tell us, please, what use you make of the service, that is what you mechanically do? A. I call for a request of change to be delivered to the store at various—various days, and I also make a deposit and place it in a night deposit bag with a lock and key and turn that over to the attendant or whatever you may call him that handles that part of it.

Q. Is that Bill Meriwether, Jr.? A. Yes, sir.

Q. And does the truck come out to your place every day? A. Yes, sir.

Q. What about on Saturdays? Does it also come to you on Saturdays? A. Yes, sir. He comes every Saturday morning.

Q. Now, what procedure do you go through in transmitting the money from your business to the bank? A. I make up the deposit or I guess you call it a memo deposit book, messenger service only, and I place my deposit in a night deposit bag and lock it; and when Bill Meriwether comes to pick it up, he receipts my deposit slip or messenger service receipt or whatever you may

call it, and I give him my bag for bringing the deposit to the bank and crediting it to my account.

Q. When did you first open an account at the First National? A. In June of 1961.

Q. And have you opened any other account since that time? A. You mean at the First National?

Q. Yes, sir. A. Yes, I have. I have a personal account, my wife and I, a joint personal account there.

Q. Well, have you opened up any other accounts in connection with your business? A. No, sir.

Q. And is the account that you have there at the First National in connection with your business a regular checking account? A. Yes, sir.

Q. And is it in connection with that regular checking account which you use on your business that you make use of the armored car service? A. Yes, it is.

Q. Do you use it at all in connection with your personal account? A. No.

Q. Do you recall, Mr. Souther, whether you signed an agreement like the one that I'm showing you here which we lawyers call Exhibit A to the affidavit of Mr. Rickerts which is called a Comprehensive Dual Control Contract? A. I recall signing an agreement, but I wouldn't be able to identify this positive as that agreement.

Q. You did sign some sort of agreement when you began to use the service? A. Yes, sir.

Q. You say when you send your monies into the bank that you sign a deposit slip or a messenger transmittal slip. A. Yes.

Q. I show you Exhibit B of the same affidavit and ask you is that a copy like the slip you use? A. Yes, it is.

Q. You mentioned that at the time—well, first let me ask you this: Who writes in the information at the top of the slip giving the name and address? A. I do. My

head cashier or whoever makes up the slip at the store writes this in.

Q. Do you know if Mr. Meriwether ever writes it in? A. Not that I recall. I don't know.

Q. All right, sir. Now, after you've written your name and address and put the amounts of money or checks that you're sending into the bank, when you deliver those to Mr. Meriwether along with the bag and this slip, does Mr. Meriwether down here at the bottom initial receipt of the locked bag? A. Yes, sir.

Q. And does he give you a copy of the slip at that time? A. Yes, sir.

Q. Now, when he comes back the next day, does he bring back to you one of these slips from the prior day's receipts? A. Yes, sir.

Q. And it's got a stamp on it? A. Yes, sir.

Q. Now, how do you go about ordering money when you want money delivered to you? A. Well, there's two ways we can order it. One is through a special telephone service, a recording that takes the order. We can order through that source when the bank is closed for business; or when the bank is open for business, we can call and give one of the tellers the order; but, as it was originally planned and the way we usually try to do it is to handle it through this recording service.

Q. Do you ever send word by Mr. Meriwether how much change you want? A. No, sir.

Q. Do you ever put a note in your bag indicating how much change you want? A. No, sir.

Q. So you place your orders by phone call either one that's recorded or one to the bank during banking hours. A. Yes, sir.

Q. Now, what happens when Mr. Meriwether, the bank messenger, delivers the money to you? What sort of mechanics do you go through at that time? A. They

have a regular form for us to sign acknowledging receipt of the amount of change that we've ordered, and the change and the monies we might order is in a locked bag; and, of course, we open that bag and check the change against the list that he brings with him and that's about it.

Q. At that time do you give Mr. Meriwether any money? A. No, sir.

Q. Suppose you ordered, say, $20 in change on a particular day and that change is delivered to you. I take it you don't, at that time, give him $20 in cash or $20 in checks in payment for the change he brings to you. A. No, sir.

Q. Instead it's debited against your account down at the bank? A. Yes, sir.

Q. Do you recall signing any agreement authorizing the bank to debit your account other than whatever you sign at the time the money is delivered? A. I'm quite sure I did. The bank usually requests signatures. In fact, they have to have on file signatures of employees at the store that can accept and sign for this money.

Q. Well, I understand that there are signature cards. Is this what you're talking about? A. Yes. You might call them cards.

Q. Well, is this a special card which shows what people are authorized to receipt for the money when it's delivered to you? A. I don't recall just what form that was in.

MR. SMITH: Once again may I point out for the record that it appears the witness is making possible reference to a document that we're not acquainted with; and, if so, Mr. Edwards, I'll ask you to produce it pursuant to the order.

MR. EDWARDS: Could I look at that?

MR. SMITH: Sure.

MR. EDWARDS: Off the record.

(Whereupon, a discussion followed off the record.)

BY MR. SMITH:

Q. Mr. Souther, Mr. Edwards has referred to this Comprehensive Dual Control Contract which I called your attention to before which we call Exhibit A and in it is language "Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank messenger for monies delivered to the depositor." Is that the document you're referring to do you think? A. You mean the original document we signed for accepting this service?

Q. No. I mean the document which tells the bank who is authorized to sign out there at your store in order to receipt for the monies that's delivered. A. I'm quite sure that's the document I signed. We're talking about several months ago and in our kind of business it would be awful hard for me to say that word for word or verbatim that this is the document that I signed, but I feel sure that it is.

Q. Do you know if any other employees of your store signed it as well? A. No, sir.

Q. Is anyone at your store authorized to receipt for the monies received besides you? A. My wife is authorized through the bank as a signature the same as mine.

Q. Well, did your wife sign this particular card, Exhibit A, with you? A. No, sir.

Q. Then if that is the agreement which indicates who is to receipt for the money, then you're the only one that signed that agreement. Is this correct? A. Yes. I'm the only one that signed this original agreement.

Q. Do you recall having signed any other agreement authorizing any other persons from your store to give receipts for monies which are delivered by Mr. Meriwether? A. Yes, I do.

Q. What other document did you sign? A. It was just a note authorizing the bank to allow my assistant manager and my wife to sign for this service when it was delivered to the store.

Q. You mean a plain piece of stationery or something like that that you wrote on rather than a form the bank provided? A. Yes. I think that's correct.

MR. SMITH: Mr. Edwards, would you produce that for me since it seems to be a document involved in these transactions?

MR. EDWARDS: Mr. Smith, at the moment I'm not prepared to say. I'd have to go back and interpret the order. The Judge ruled on a motion to produce and directed me to produce certain things and all of those things I will produce. I'm not aware that there is any other document other than the Exhibit A that is now being discussed. I do not understand that I am directed to produce any document concerning any particular person and I am just not prepared to say. I haven't interpreted the order to produce at this point.

MR. SMITH: You want to take it under advisement, is that right?

MR. EDWARDS: I think that's a good idea.

BY MR. SMITH:

Q. Are you familiar with a document which is signed either by you or what other persons may be authorized to sign when money is delivered to you? A. State that again, please.

Q. Yes. Are you personally familiar with a document which is signed when money is delivered to you? A. Yes.

Q. I show you what we call Exhibit C attached to Mr. Rickerts' affidavit and ask you is that a copy of the sort of document you're talking about? A. Yes. That's a copy of the original of the document.

Q. And when you or the other person, whoever receives the money, signs this, does the bank leave with you a pink copy? A. Yes.

Q. What do you do with those? A. I keep that for my records. We have to use those to—we have certain forms we use for checking our register each week. We have to have that figure to tie in with the other part of the operation.

Q. So you save them, then, for your accounting purposes, is that right? A. Yes.

Q. At least you save them until they've met your needs? A. Yes.

Q. And then you discard them? A. Yes, sir.

Q. Have you ever had any occasion, to your knowledge, sir, when the amount of money which you ordered to be delivered to you was such that it caused you to be overdrawn in your account? A. Not that I know of.

Q. Did you have any discussions with the bank as to what would happen if the amount of money that you ordered resulted in an overdrawal of your account? A. I don't recall that being mentioned at all.

Q. Have you had occasion to talk with any representative of the First National Bank about the messenger service and the mechanics of the messenger service within the last month? A. No, sir.

Q. Have you had occasion to discuss it with Mr. Edwards before we came here today? A. No, sir. I don't guess I've seen Mr. Edwards in a year.

Q. Have you had any occasion to discuss the situation with Mr. Charles Futch? A. Other than the fact that he called me and he said he would possibly use me on this deposition.

Q. When was it that he called you? A. Last week or the week before last, I believe.

Q. And what was the substance of the conversation? A. That they were going to hold a deposition to try to get this situation straightened out or something and he'd like to use me as one of the witnesses and he asked me if I would object and I told him no, I wouldn't.

Q. Did you at that time discuss any of the mechanics of the operation with Mr. Futch or did he tell you anything about them? A. No, sir, he did not.

Q. How far is your store from the main banking house of the First National Bank on Haines Street in Plant City? A. Approximately six miles.

Q. Did you pay the bank anything for the canvas bags which you use in this transaction? A. Yes, sir. I think —I didn't pay them as such. It was charged to my account.

Q. Do you remember how much you were charged? A. No, sir, I don't.

Q. Are you sure that you were charged? Do you have a clear recollection of it? A. I'm quite sure that we were. My bookkeeping is handled through our central office in Orlando. They furnish us a bookkeeping service. I check my bank account, the balance and so forth each month and send the rest of it up for them to do and—

Q. Do I correctly understand that IGA is not a chain of grocery stores in the sense that Publix and some of those are, but you are a member of an association of independent grocers. Is this right? A. Yes, that's correct.

Q. And that association renders certain services to its members? A. Yes.

Q. Such as advertising and accounting? A. Yes, sir. Of course, we pay for this accounting service.

Q. Yes, but in essence you are an independent operator? A. Very definitely, yes, sir.

MR. SMITH: I have no other questions.

Examination by Mr. Edwards

Q. Mr. Souther, when you prepare this bag and lock it, you hand it to the messenger, is that right? A. Yes, sir.

Q. He gives you a receipt for it? A. Yes.

Q. At that time? A. Yes.

Q. And he then transmits it to the bank? A. Yes, sir.

Q. When do you receive a validated deposit slip for these funds that are contained in that bag? A. The messenger returns a validated receipt the following day.

Q. Now, if there is not enough money in that bag whenever it is transmitted to the bank, what happens?

MR. SMITH: I object to the question. The witness testified it never occurred.

THE WITNESS: I don't recall testifying to that.

MR. SMITH: I beg your pardon.

MR. EDWARDS: I think he testified he was never overdrawn, is my recollection of it.

MR. SMITH: Yes. You're right. Excuse me. I'll withdraw the objection.

A. Now, will you state your question again?

BY MR. EDWARDS:

Q. Yes. Whenever you turn over a bag to the messenger service and they take it in and there's not as much funds in there as the transmittal slip indicated that there was. Has this ever happened to you? A. Yes.

Q. What happens then? A. The bookkeeping sends me notice on it. It's usually just a few cents or a few dollars, something like that, and they mail me a report on it.

Q. Is it, in effect, an adjustment? A. It's either a charge or credit to my account, whichever way this thing comes up.

Q. Whether it's over or under? A. Yes, sir.

Q. So that they charge your account either way? A. Yes, sir.

Q. All right, sir. When do you get credit for this money that is sent by the messenger service?

MR. SMITH: Excuse me. I don't understand the question. Get credit from whom?

BY MR. EDWARDS:

Q. When does the bank credit your account for these monies that are sent? A. No earlier than the following day. The reason I make it no earlier than the following day, on the weekends—in other words, the deposit that goes in Saturday morning, we aren't credited for it until Monday.

Q. When it's there at the bank, then? A. Yes, sir.

Q. Was it explained to you by the officers of the bank—

MR. SMITH: Don't lead the witness, please.

BY MR. EDWARDS:

Q. —that the monies that was transmitted by you to the bank was done as your agent? A. Yes.

MR. SMITH: Objection, question is leading and I move to strike.

BY MR. EDWARDS:

Q. What is your understanding as to the arrangement under which these monies are transmitted to the bank for you? A. I think most of that has been covered through answering these various questions.

As I say, we call the bank through this night recording service requesting a certain amount of change and monies or we call the bank during their hours and make this re-

quest, and it is delivered to the store the following morning, and on a regular delivery schedule, and at that time we have deposits prepared under lock-and-key bag to turn over to the messenger service to carry to the bank for me; and at the same time we accept the change and the monies that he might have for us and sign a receipt as accepting such.

He also gives us a receipt for the money that he's transporting to the bank for us.

I think that pretty well covers it.

MR. EDWARDS: I have no further questions.

MR. SMITH: Mr. Souther, this deposition has been taken pursuant to Federal Rules of Civil Procedure and those rules give you the right to read the testimony which you have given here after the Court Reporter has transcribed it into the English language so you can read it. The purpose of your reading it is to correct any errors she might have made in taking the deposition. After you've read it, you sign it. If you desire to read and sign it, arrangements will have to be made so that you and the Court Reporter can get together for the signing.

In the alternative you can waive the reading and signing and, in effect, rely on the accuracy of the Court Reporter; and we'd like to know now whether you'll be willing to waive the reading and signing of the deposition.

You can ask Mr. Edwards if you want to about it.

THE WITNESS: I would prefer to ask Mr. Edwards.

MR. EDWARDS: Can we go off the record?

MR. SMITH: Sure.

(Whereupon, a discussion followed off the record.)

THE WITNESS: I'll waive it.

STIPULATION

It was thereupon stipulated and agreed by and between counsel present for the respective parties that the reading and signing of the deposition be waived.

It was further stipulated and agreed by and between counsel present for the respective parties that filing and notice of filing be waived.

WHEREUPON, THE TAKING OF THE DEPOSITION WAS CONCLUDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF FRED O. DICKINSON, JR. —FILED APRIL 21, 1967

STATE OF FLORIDA
COUNTY OF LEON

Before me, the undersigned authority, personally appeared Fred O. Dickinson, Jr., who, being first duly sworn, deposes and says:

1. I am Comptroller of the State of Florida, and Ex Officio, the State Commissioner of Banking, and as such I am an official of the executive branch of the government of the State of Florida. Among my duties is the enforcement of the banking laws of the State of Florida.

2. I make this affidavit in opposition to the Motions for Summary Judgment heretofore filed in this cause.

3. Since 1913, it has been the position of the Office of the Comptroller of the State of Florida that no bank located in this state may carry on banking business anywhere except at its banking house, authorized drive-in facility, or when acting under an authorized school or

institutional thrift or savings plan. It is the opinion of the Office of the Comptroller of the State of Florida that the performance in the State of Florida of off-premise armored car operations by banks and their employees and off-premise bank depositories constitutes branch banking in violation of the banking laws and the public policy of the State of Florida.

/s/ Fred O. Dickinson, Jr.
Comptroller of the State of Florida
Ex Officio State Commissioner
Of Banking
Tallahassee, Florida

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF JOHN V. CHAPMAN —FILED APRIL 21, 1967

STATE OF FLORIDA
COUNTY OF LEON

Before me, the undersigned authority, personally appeared John V. Chapman, who, being first duly sworn, deposes and says:

1. I am Deputy Commissioner of Banking for the Comptroller of the State of Florida, and I have served in this capacity since 1945. As Deputy Commissioner, I advise the Comptroller of the State of Florida on all banking matters and am directly responsible to the Comptroller as State Banking Commissioner in the operations of the Banking Department of the Office of the Comptroller of the State of Florida.

2. I make this affidavit in opposition to the Motions for Summary Judgment heretofore filed in this cause.

3. It is the position of the Office of the State Comptroller that employees or messengers of banks in the State of Florida are prohibited from receiving deposits at any place other than at the banking houses, authorized drive-in facilities, or when acting under an authorized school or institutional thrift or savings plan; and picking up checks or delivering change at any place other than the banking house or authorized drive-in facilities.

4. This office has never prohibited a bank customer from contracting with an independent armored car service for the purpose of delivering the customer's deposit or change to a bank or the customer having the armored car service deliver to said customer monies from a bank in the State of Florida.

5. Upon the request of one of the Departments of Armed Forces of the United States, the Secretary of Treasury has authorized banks to establish a banking facility at certain military installations within the State of Florida, which installations have been designated as a Depository and Financial Agent of the United States Government. The Office of the Comptroller of the State of Florida, during and subsequent to World War II, has been requested by the Secretary of Treasuury to authorize state banks to install facilities on such military installations. Several state banks, after having first been authorized by the Secretary of Treasury and the Federal Deposit Insurance Corporation, have received authorization from the Comptroller as State Banking Commissioner to install such facilities. Having granted authorization to state banks, it is the position of this office not to file objections to the several national banks in Florida who have installed banking facilities in such manner at military installations in the state.

6. It is the public policy of the State of Florida, as enunciated by the legislature in the State Banking Laws and as enforced by the Office of the Comptroller of the

State of Florida, to require all banking activities to be carried on only at banking houses, authorized drive-in facilities, and schools or institutions authorized under a school or institutional thrift or savings plan.

/s/ John V. Chapman
Deputy Commissioner of Banking
Office of the Comptroller
Of the State of Florida
Tallahassee, Florida

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF RAY GREEN
—FILED APRIL 21, 1967

STATE OF FLORIDA
COUNTY OF LEON

Before me, the undersigned authority, personally appeared Ray Green, who, being first duly sworn, deposes and says:

1. I am presently President of the Parkway National Bank, Tallahassee, Florida. From 1955 to 1965, I was Comptroller of the State of Florida, and from 1949-1955, I was the assistant state comptroller. For many years I was an active member of the National Association of State Bank Supervisors.

2. At no time during my years as assistant state comptroller and as state comptroller were state or national banks in Florida permitted or authorized to perform off-premises armored car operations or to operate off-premises bank depositories. Such banks were not authorized or permitted to own and/or operate an armored car to deliver money to customers or to receive money, checks

and/or other items from customers, off-premises, and deliver the same to the bank. Such banks were not authorized or permitted to maintain a facility away from the banking premises to receive deposits of money, checks and/or other items. All requests made during this time for authorization to perform any banking activities, including those described above, off-premises were refused. The Comptroller has consistently ruled that performance by a bank of armored car operations and operation of an off-premises bank depository constitute branch banking in violation of the laws and public policy of the State of Florida.

3. Based upon my years of experience as a banker and as Comptroller of the State of Florida, it is my opinion that, when a bank receives possession away from its banking house or authorized drive-in facility of monies and checks from customers with the understanding that the monies and checks are to be deposited, such a bank is engaging in the general business of banking away from its banking house.

/s/ Ray E. Green
President, Parkway National Bank

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF FRANK H. MOODY —FILED APRIL 21, 1967

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority in and for said County and State, personally appeared FRANK H. MOODY, who being by me first duly sworn, deposes and states as follows:

1. I am the President and chief executive officer of the Hillsboro Bank, a banking corporation organized and existing under the laws of the State of Florida and located in Plant City, Florida. I have been associated with the Hillsboro Bank for thirty-three years, and have acted as its President since 1963. The Hillsboro Bank has served customers in the Plant City trade area continuously from 1902 to the present date.

2. The Hillsboro Bank and the First National Bank in Plant City are the only commercial banks doing business as such within the city limits of Plant City, Florida. They compete for customer accounts, deposits, loan accounts and other banking business in Plant City and in the trade area adjacent to Plant City, Florida. Both banks have had solid and steady growth.

3. Deposits are the life-blood of a bank, and competition between banks is primarily for deposits, for without them a bank cannot make loans or profits thereon, thus, if national banks such as the First National Bank in Plant City are given increased deposit opportunities at the expense of State banks such as the Hillsboro Bank, state banks in Florida and particularly in Hillsborough County will be at a severe competitive disadvantage in performing a general business of banking.

4. Annexed hereto as Exhibit A is a brochure widely distributed by the First National Bank in Plant City to residents in Plant City and the adjacent trade area.

/s/ Frank H. Moody

Exhibit A of Affidavit of Frank H. Moody is the same as Exhibit 1 to the Deposition of Charles Futch and is set out here at pages 118-119.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF ED GONZALEZ

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Personally appeared before me, the undersigned authority, Ed Gonzalez, who, being by me first duly sworn, stated under oath:

1. That he supervises and is in charge of all stores of Fremac's outside of Tampa, Florida, including Fremac's store at Plant City Plaza.

2. That in the summer of 1966 Fremac's was planning to open a store at Plant City Plaza and intended to use The Hillsboro Bank in Plant City as the local bank for its banking needs. That thereafter, affiant and officers of Fremac's were contacted by representatives of The First National Bank in Plant City and were advised that First National intended to and would open, operate and maintain a depository for money, checks and other banking items at Plant City Plaza and would provide an armored car service for transportation of deposits from the Plant City Plaza depository to the bank and for transportation of money from the bank. Solely because of these services, Fremac's then decided to use the First National for its banking needs instead of The Hillsboro Bank.

3. That Fremac's management was not told by any representative of First National Bank that with reference to use of the depository at Plant City Plaza or the armored car, the Bank, or its employees, was acting as agents of Fremac's; that Fremac's did not knowingly appoint any employee of First National to act as its agent; that Fremac's understood that all monies and checks placed in the depository at Plant City Plaza or

transported by the armored car were the responsibility of the First National and First National would carry insurance to cover loss of the same; that no representative of First National discussed with Fremac's management any contractual or agency relationship or explained the legal relationships, if any, which arose from use of the depository or the armored car service.

/s/ Ed Gonzalez

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

AFFIDAVIT OF S. F. McROBERTS

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Personally appeared before me, the undersigned authority, S. F. McRoberts, who after being duly sworn, stated under oath:

1. That he is now employed by Fremac's Department Stores as Store Manager of the Fremac store located at Plant City Plaza, Plant City, Florida. That he has held this position since, and prior to, the opening of said store on or about October 6, 1966.

2. Fremac's store at Plant City Plaza was opened for business on October 6, 1966. On October 7, 1966, affiant signed the Agreement attached hereto and by reference made a part hereof. Affiant was then given a canvas bag by First National for deposit of money and checks in the depository at Plant City Plaza and a key to the depository so the same could be opened for deposit of the bag therein.

3. Fremac's Plant City Plaza store routinely and customarily uses the described facilities of First National

Bank as follows: At the end of each business day, it places its receipts, consisting of cash and checks, in the night bag and places the same in the depository at Plant City Plaza. It does not include with the bag, or otherwise deliver to First National, any transmittal slip, deposit slip or agreement of any sort. The following morning, affiant goes to the main banking house of First National on Haines Street and obtains the bag which was placed in the depository the night before. This bag has not been opened by any employee of First National. Affiant then takes the bag back to his store, opens the bag, makes up a regular deposit slip for the checks and money he desires to deposit from the prior receipts, retains some funds for use in transacting the business of the day, and takes the balance to First National with the deposit slip and delivers the same to bank employees. A copy of the deposit slip so used is attached hereto.

4. When the depository and armored car facilities of First National were discussed with affiant by representative of First National, during the summer of 1966, affiant was told First National would deliver money to Fremac's if desired. During the Christmas season of 1966, affiant called First National and asked for change to be delivered to the store. A person who affiant understood to be a teller of the bank delivered $20.00 in change to affiant by armored car. Upon delivery of the change, affiant gave the teller the sum of $20.00 in bills in exchange for the change. Affiant signed a receipt for the change. The teller handled the transaction as if it was a habitual or routine practice with him. The teller did not give any explanation of any sort concerning the transaction, the receipt or any document considered pertinent to the transaction. He simply filled out the receipt, delivered the change, and accepted the $20.00 in exchange, filling out a transmittal slip in that amount. Affiant does not know if a change account was established for a Fremac's Corp.

5. Fremac's store at Plant City Plaza is engaged in the business of selling men's clothing and accessories at retail to the general public.

/s/ S. F. McRoberts

Approved by Bank
Management Commission
of Amer. Bankers Assoc.

NIGHT DEPOSITORY AGREEMENT

10-7-1966

Bank The First National Bank in Plant City

Address Plant City, Florida

To induce you to permit the undersigned to utilize your Night Depository Service and in consideration of rendition of such service, the undersigned expressly agrees that the use of said Depository is a mere gratutious privilege and that the exercise of such privilege shall be at the sole risk of the undersigned, and you shall not be responsible for the safekeeping of any deposit made in said Depository; that each deposit placed in the Depository shall be contained in a securely locked special pouch supplied by you; that you may remove the pouch from the Depository and hold the same until called for and that your findings and records as to the presence in or absence from the Depository of any such pouch and as to the contents thereof in the event such pouch shall not have been locked shall be conclusive and binding upon the undersigned; that the undersigned will in person or by authorized agent or representative call at your bank on the next banking day following the night of deposit, identify and claim the pouch and execute and deliver to you a receipt therefor; that no deposit made in said Depository shall be considered as having been placed to the credit of the banking account of the undersigned or as having been received by

you as a deposit to be placed to the credit of the undersigned until the pouch found in the Depository shall have been opened by the undersigned or authorized agent or representative of the undersigned and the contents thereof accepted by you in like manner as general deposits.

The individuals whose signatures appear below have been duly appointed agents or representatives of the undersigned for the purpose of opening pouches deposited in said Depository, and depositing the contents thereof with your bank or executing in the name of the undersigned receipts for said contents when delivered to them by you.

Receipt is hereby acknowledged of special pouch No. 145-146, lock and two keys thereto, and key to the entrance to said Depository. In case of loss of key to the door of the Depository, the undersigned agrees to notify you immediately and to pay you $.50 for a new key if one is issued; also to return the aforementioned equipment upon the termination of this arrangement or to pay you therefore at the rate of $ NC for the pouch, lock and keys thereto and $.50 for the key to the entrance to the Depository.

It is understood that you may revoke the privilege of the undersigned to use your Night Depository Service by mailing notice of revocation addressed to the undersigned at the address given below.

/s/ Steven F. McRoberts
Signature of Depositor

.....
Address

Signatures of Authorized Agents

/s/ Pauline Wigner

/s/ Steven F. McRoberts
Signature of Depositor

June 28, 1966

Mr. Robert L. Schwind
Regional Counsel
Sixth National Bank Region
1315 Fulton National Bank Building
Atlanta, Georgia 30303

Dear Mr. Schwind:

I have talked with a sales representative of the American Sign & Indicator Corp. and find that the "Speed Depositor" is not available at this time and is being engineered for re-introduction on the market. It is my hope that we will be able to make use of the machine in a local shopping center when it is available.

Since this machine has received the approval of the Comptroller, I am wondering if a night depository constructed in a shopping center under the same circumstances might also receive his approval. I would expect that the bag would be received in a similar manner as those now being received at the bank premises. However, it would be made clear that the transaction is not a deposit until such time that it arrives at the bank and, of course, adequate insurance coverage would be provided by the bank. The night bags would be picked up in the morning by a bank guard and proper security measures would be taken. . .

I am not asking for formal approval and would expect that you will need more details for such, however, any thoughts you can give me on this matter would be greatly appreciated.

Very truly yours,

William M. Rickert
President

WMR/bjm

January 4, 1967

Please find enclosed receipt in the amount of $100.00 which you placed in our receptacle at the Plant City Plaza. We appreciate very much your using the Plaza receptacle and hope that it is a convenience to you. In using it we will appreciate your using the transmittal forms which we have provided there rather than your normal deposit slips as items left there for transmittal are accepted under the transmittal contract.

For your convenience I am enclosing blanks for your use next time.

Very truly yours,

Charles E. Futch, Jr.
Vice President & Cashier

CEF/bc

Enclosures

September 16, 1966

Mr. Robert L. Schwind
Regional Counsel
Comptroller of the Currency
1315 Fulton National Bank Building
Atlanta, Georgia 30303

Dear Mr. Schwind:

We are proceeding with our bank messenger service in our local shopping center as referred to in our earlier letter. We are also purchasing an armored car and plan to operate it as being done in Panama City.

We are using the transmittal slip exactly as you suggested for the armored car and the money receptacle in the shopping center. You will recall that in your letter of June 29th it was suggested that a notice must be posted at the money receptacle. I am attaching a copy of the

lettering for this sign which will be posted immediately over the receptacle. It is our proposal that it will be printed on a sign approximately 12 x 18 inches.

I am writing this letter to be certain that this will meet your approval.

Very truly yours,

William M. Rickert
President

WMR/bjm
Enclosure

LETTER RULINGS FROM THE COMPTROLLER OF THE CURRENCY

September 11, 1953

Dear Mr. Morris:

Reference is made to your letter of August 18, 1953, addressed to Chief National Bank Examiner R. S. Beatty, which Mr. Beatty has referred to this office for reply. The question raised there is the permissibility of one of the directors of your bank operating an armored car service in Cheyenne.

It would appear that any objectionable features of the plan would not directly arise from the fact that a bank director is operating an armored car service, but rather, difficulty may occur from the nature of the services a director-owned corporation might render your bank. The term "branch" is defined in Section 5155 of the Revised Statutes (12 U.S.C. 36) to include

> "* * * any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

In interpreting this section this office regards the crucial point to be whether those persons receiving deposits outside the banking quarters are acting as agents of the bank. In determining such a relationship we consider, among other things, whether the service purports to act as representative of the bank, whether the service is compensated by the bank rather than by the customer, whether responsibility for loss would be borne by the bank or by the armored car service, etc. Should any one of these factors be found to exist then the entire activity would be an illegal branch banking activity.

We have no objection if a plan is arranged under which an armored car service acts as the agent of depositors, and the bank has no responsibility, apparent or otherwise, for the deposits until they reach the banking quarters. We could not say, as a matter of law, that a director of your bank could not engage in such an activity. However, this office will examine with great care any arrangement arrived at between your bank and an armored car service operated by a bank director.

Yours very truly,

/s/

Deputy Comptroller of the Currency

• • •

May 31, 1962

Dear Mr. Crockett:

This is in reply to your letter of March 22, 1962, in which you have inquired as to the existence of regulations governing the activity of bank couriers or messengers who deliver cash to customers and pick up deposits from them. You state that your principal interest is in possible distance limitations on such operations.

The furnishing of this type of service by a bank often comes into conflict with the provisions of 12 U.S.C., Section 36, as constituting an illegal branch banking activity.

This section defines a branch as any place "at which deposits are received, or checks paid, or money lent." We have maintained that the practice of furnishing mobile pick-up service of the deposits of customers is a type of branch banking which the statutes do not permit. As to the delivery of cash to customers, we have not objected when the customer's check for the full amount is presented to the bank for payment prior to the departure of the messenger, so that it cannot be said that the checks are being cashed away from the banking premises.

On the other hand, we would not object if a group of your customers hired a messenger to perform a deposit pick-up service at their expense. In such an arrangement, the messenger would be the agent of the customer and not of the bank, and no deposit is effected until the funds reach the bank.

There are no distance regulations as to those operations which comply with the foregoing.

Very truly yours,

(Signed) G. W. Garwood

Deputy Comptroller of the Currency

DEM:mz—5/29/62

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

MOTION TO POSTPONE HEARING ON PENDING MOTIONS FOR SUMMARY JUDGMENT, TO REQUIRE PRODUCTION OF WRITTEN MATERIALS, AND TO ALLOW AND ORDER FURTHER DISCOVERY—FILED APRIL 24, 1967

Intervening defendants, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, by their undersigned attorneys, move the Court to postpone indef-

initely the hearing presently scheduled for April 25, 1967, on the motions for summary judgment of plaintiff and intervening-plaintiff, to require production by plaintiff and intervening-plaintiff of written materials, and to allow and order further discovery herein, and in support thereof show unto the Court the following:

1. Heretofore intervening defendants sought to obtain from intervening plaintiff by motion to produce, dated March 16, 1967, all written rulings, letters of authority, opinions, written memoranda and similar written materials issued or maintained by the Office of the Comptroller of Currency, his departments or his regional offices, pertaining to armored car facilities and off premises depositories. By motion to produce, dated ....., 1967, intervening defendants also sought to obtain similar correspondence between intervening-plaintiff and national banks in Florida. By Supplemental Interrogatories dated March ..., 1967, intervening defendants also sought to obtain the names and addresses of all national banks known to intervening-plaintiff to be conducting armored car operations or maintaining an off-premises depository.

On or about March 20, 1967, intervening-plaintiff filed the affidavit of William B. Camp, Comptroller of the Currency of the United States, in support of motion for summary judgment in which Mr. Camp stated in part that his office has made consistent rulings in support of his present position and had stated regularly this position in letter rulings. Four such rulings are attached to the affidavit as being representative of all such rulings. The affidavit also contained the assertion that records in Mr. Camp's office showed that banks in other stated conducted activities similar or identical to those under consideration in this cause. By Supplemental Motion to Produce, dated March 24, 1967, intervening defendants sought to obtain production of the records mentioned in the affidavit.

Intervening defendants further sought by appropriate motion and notice to take the deposition of Mr. Camp.

Upon hearing on April 10, 1967, of the aforementioned motions and of objections to the aforementioned interrogatories, and by order entered April 17, 1967, the Court declined to require Mr. Camp to testify on oral deposition, denied the motions to produce and sustained the objections of intervening-plaintiff to the interrogatories except that the Court required intervening-plaintiff to produce the contents of certain files containing precedents, which files were located in Washington, D.C.

On or about April 14, 1967, attorneys for intervening defendants went to Washington, D.C., inspected the precedent files and obtained copies of the contents thereof, which copies have now been filed in this cause. They are made a part hereof by reference. On April 18, 1967, attorneys for intervening defendants took the deposition of Mr. R. L. Schwind in Atlanta, Georgia. Mr. Schwind is Regional Counsel for the Sixth Region of the Office of the Comptroller of the Currency and is the attorney who wrote letters of authority relied upon by plaintiff herein.

Mr. Schwind stated in his deposition that he applied rulings and precedents of the Office of the Comptroller of Currency in rendering his views to member banks on factual situations presented to him, but the precedents file made available to intervening defendants in Washington, D.C. contained no rulings or precedents pertinent to operation of an off-premise depository. Mr. Schwind further stated that variations of the factual situations would affect the answer given to inquiries of member banks but the files made available to intervening defendants in Washington, D.C. did not contain the inquiries of member banks upon which the "precedents" were made. Further, the rulings contained in the precedents file sometimes made reference to forms of contracts con-

sidered by the Comptroller of Currency in formulating the precedents but no contracts were available. Moreover, there was obliterated from the materials produced in Washington, D. C., all identifying features of the bank involved.

As a consequence of the foregoing, intervening defendants are unable to (1) determine if precedents exist for all activities involved herein; (2) to determine the facts upon which rulings were made which are alleged to be pertinent herein; (3) determine either from the files produced or from the banks involved the factual situations upon which prior rulings, alleged to be pertinent herein, were rendered; and (4) to determine if such precedents relate to banks in states where branch banking is lawful.

On or about April 14, 1967, intervening defendants discovered an article published in the November 14, 1957 issue of the *American Banker* indicating that as early as 1938 the Comptroller of the Currency refused to allow an armored car of a Florida national bank to pick up deposits away from the main banking house. No such ruling was produced in response to the motion to produce and attempts to obtain such information regarding Florida banks by discovery were previously denied herein. The pertinent portion of said article is attached hereto.

The sworn affidavit of Mr. Camp, aforementioned, contains the statement that the Comptroller of the Currency has consistently ruled on the issues involved herein since 1929. The rulings produced from the precedents file speak for themselves, but they do not appear to be consistent. Neither do the rulings attached to Mr. Camp's affidavit appear to be representative of all pertinent rulings on the subject. Intervening defendants accordingly submit with respect that they should be allowed to depose Mr. Camp before hearing on the pending motions for summary judgment.

2. Heretofore intervening defendants, by supplemental motion to produce dated March 18, 1967, and by supplemental interrogatories of the same date, sought to obtain a list of those persons who have used, and are using, the facilities of plaintiff which are in issue herein. By its order of April 17, 1967, the Court required plaintiff to furnish the names of ten per cent of the present users. Plaintiff produced five names. All persons named have now been deposed by intervening defendants. The depositions reflect that some, if not all of such persons, had been contacted by plaintiff before the names were furnished and that at least some were asked about their attitude toward the facilities in issue here before their names were supplied. The depositions further reflect that plaintiff's practices in serving the persons whose names were supplied are not uniform and intervening defendants are unable to determine the practices customarily followed in use of the facilities, if any, and to present the same to the Court at this time for judicial evaluation and decision.

The depositions of said persons further reflect doubt that persons ordering money for delivery by the armored car services have accounts against which plaintiff bank makes an actual debit of the amount of money thus ordered, as claimed. Further discovery into this aspect of the case is therefore necessary in order that the Court may evaluate and decide the issues of the cause.

WHEREFORE, intervening defendants move the Court as follows:

(1) To postpone hearing of the pending motions for summary judgment;

(2) To allow intervening defendants to take the oral deposition of William B. Camp, before hearing of said motions;

(3) To grant in full, or in some enlarged scope, the motion for production of written rulings and other

pertinent materials by the Comptroller of the Currency;

(4) To require plaintiff to produce the names of all persons who have used or are using the facilities of plaintiff involved herein and to allow intervening defendants sufficient time to interview or depose a more representative number of such persons;

(5) To give intervening defendants further opportunity to renew their motions to produce, or to present additional motions, whereby access will be obtained to the records of accounts of plaintiff used in connection with the facilities;

(6) To grant such further relief as the Court deems proper.

Carlton, Fields, Ward, Emmanuel, Smith & Cutler,
Attorneys for Intervening Defendants
P. O. Box 3239,
Tampa, Florida 33601

By /s/ Wm. Reece Smith, Jr.

Past Mobile Banking Attempts

The facts, as they have appeared in the AMERICAN BANKER over the years, and in very few other sources, are that sporadic attempts to utilize mobile banking in the United States have foundered on the rock of adamant policy at Washington.

Back about 1938, as we recall, the First National Bank of Miami, then headed by E. C. Rompf, began the use of an armored car to pick up deposits as far as Homestead, 40 miles away from Miami. Because Florida prohibits branch banking, the Comptroller of the Currency ruled the bank's cars off the roads.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

MEMORANDUM DECISION —FILED MAY 6, 1967

This action was initiated by the First National Bank in Plant City against the Comptroller of the State of Florida in his additional capacity as Commissioner of Banking. The complaint alleged that the State Comptroller had advised the bank that its armored car messenger service for pick up and delivery of cash and other items was a violation of Section 659.06(1) (a) Florida Statutes which provides that "the business of a bank" shall be transacted only at its banking house. The bank asked the Court to declare that its messenger service was not in violation of Section 659.06(1) (a); to enjoin the State Comptroller from "interfering with the lawful operations of Plaintiff"; and for various judgments declaring the relationship of state and federal banking officials and banking laws.

In his answer to the complaint the defendant referred to Section 659.06(1) (a) of the Florida Statutes and to the provisions of the National Bank Act contained in 12 U.S.C. 36 and 81 in support of his position that the bank's activities were unlawful.

Shortly after the federal court proceedings were initiated the State Comptroller filed suit in a state court alleging violation of 659.06(1) (a).

On October 20, 1966 this Court issued its Orders staying proceedings in the State Court and temporarily restraining the State Comptroller from interfering with the plaintiff herein in its conduct of armored car and receptacle services.

Subsequently, three state banks were given leave to intervene permissively as defendants, Brinks, Inc. and the

Independent Bankers Associations of Florida and of the United States were permitted to participate as amici curiae and the United States Comptroller of the Currency was granted leave to intervene as a plaintiff.

Both plaintiffs have now moved for summary judgment, memoranda of law with respect thereto have been field and considered and the Court has heard argument on the motions in open court. By order of the Court, the two issues of the State Comptroller's authority to regulate national banks and of whether the messenger and receptacle services in question constitute an incidental power which can be properly exercised by a national bank pursuant to 12 U.S.C. 24(seventh), although raised by the motions for summary judgment, have been deferred for whatever further consideration may be appropriate.

The record before the Court indicates that the United States Comptroller of the Currency has published in his Manual for National Banks, Ruling 7490[1] which authorized, with various conditions, the provision by national banks of an armored car messenger service to pick up and deliver monies and other items from and to their customers.

On the basis of the Comptroller's ruling and of various communications from the Comptroller's Office, First National Bank in Plant City, in September of 1966 inaugurated a service whereby an armored car owned by the bank and operated by its employee would pick up cash, checks or other items from customers of the bank for deposit to

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[1] 7490. MESSENGER SERVICE

To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

their accounts at the bank. In addition the messenger would deliver cash to customers upon their request. Furthermore, the bank caused a concrete receptacle to be constructed in a shopping center into which items could be placed for pick up by the bank's messenger.

The Comptroller's ruling requires that an agreement be entered into by the bank and its customer using the messenger service providing that the "messenger is the agent of the customer rather than the bank." The record[2] shows that the practice prescribed by the bank and normally followed by its customers was for the customer sending money for deposit to fill out and attach to the items given the messenger or placed in the receptacle a "Messenger Transmittal" which included the following language:

> First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

Furthermore, most of those sending money for deposit and all customers to whom cash was delivered had signed a "Comprehensive Dual Control Contract" which provided that

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[2] By the Court's order plaintiff produced the names of 10 percent of its customers for deposition by defendants. Conclusions in this decision with respect to the bank's operations are based on those depositions and on the affidavits submitted by all parties.

> As agent for the undersigned depository, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

When money was delivered to customers it was accompanied by a slip which stated

> Your account has been charged for the TOTAL shown hereon representing monies requisitioned for delivery to you by bank's messenger.

The concrete receptacle bore a legend stating in similar terms that monies placed therein would not be deemed deposited until received at the bank's main banking premises.

On these facts, the defendants argued that the messenger and receptacle services, as authorized by the federal Comptroller and conducted by the First National Bank, constitute branch banking in violation of 12 U.S.C. 36(c)[3] which generally forbids national banks to branch in those states in which branching is forbidden to State chartered banks. In addition, defendants urged that the services in question involve doing the "general banking business" away from the main premises of the bank in violation of 12 U.S.C. 81.[4]

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[3] 12 U.S.C. 36 (c) provides in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication of recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

[4] § 81. Place of business

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

While acknowledging that the branching Section of the National Bank Act contains, at 12 U.S.C. 36(f), a description of the term branch:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent;

defendants deny that this section constitutes an exclusive definition and suggest that state law must be considered, as well, in defining a national bank branch. Further, defendants contend that even if one of the three functions enumerated in 12 U.S.C. 36(f), that is, receiving deposits, paying checks or making loans must be present, before a particular activity may be properly deemed branching, nevertheless the activities in question here involve both receiving deposits and paying checks away from the banking house.

It is argued that no real agency relationship exists between the customer and the messenger in that the bank owns the armored truck, pays the messenger and insures the monies while they are in transit.

Furthermore, defendants contend, facts in the record indicate that from time to time variations from the general procedures occur, such as the failure to use the transmittal slip. These variations, it is argued, disrupt whatever agency relationship may normally exist.

Finally defendants urge that the principle of "competitive equality" governs the relations between National and State banks and that, as Florida state banks may not operate armored car services national banks should not be permitted to do so.

Plaintiffs, on the other hand, take the position that 12 U.S.C. 36(f) is plainly a definition of the term branch

as it applies to a national bank, and argue that unless one of the three functions there described is present the operation is not a branch.

A deposit relationship is one of contract, plaintiffs argue, and the bank and its customers contract, by means of the various forms which accompany cash and other items passing back and forth, that the deposit does not take place until the funds are received by a teller at the bank's premises and the deposit ends by means of the charge to the customer's account prior to delivery by the messenger.

Plaintiffs further contend that the agency agreement is an additional contractual arrangement to make abundantly clear that, as the monies are being transported by someone acting in the capacity of agent for the customer, they are not legally in the possession of the bank until they reach the bank's premises or after they have been subsequently withdrawn from the bank for redelivery.

As to the Section 81 question the Federal Comptroller and the national bank take the position that that section requires only that the "general business" of a national bank be transacted at its main office and that judicial and administrative interpretation through the years have made it clear that substantial activities, including particularly agency operations, may be conducted away from the main banking house.

Each of the above positions, plaintiffs say, are subscribed to by the Federal Reserve Board[5] and the Federal Deposit Insurance Corporation with respect to the banks under their jurisdiction for various purposes.

Finally plaintiffs urge that the question of competitive equality between the two banking systems comes into

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[5] The Board's ruling on the subject is published at 12 C.F.R. 208.110.

play only with respect to the authority to establish branches. If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks.

The issues presented by these motions are complex but the Court is persuaded after consideration of the briefs and argument and the facts in the record that the armored car and receptacle services authorized by the Comptroller and customarily and ordinarily operated by First National Bank in Plant City do not constitute branching or the "general banking business," in violation of 12 U.S.C. 36 or 81 and that Florida statute 659.06(1) (a) is not operative or controlling in this instance.[6]

The definition of branch contained at 12 U.S.C. 36(f) must be deemed to be the exclusive definition with respect to national banks. *Jackson v. First National Bank of Valdosta,* 246 F. Supp. 134 (1965).

To argue that deposits are received or checks paid away from the banking premises is to ignore the plain effect of the deposit and agency contracts entered into by the bank and its customers. "The relationship of depositor and banker arises only out of contract, express or implied" 9 CJS § 267, p. 545. See also *McCrory Stores Corporation v. Tunnicliffe,* 104 Fla. 683, 140 So. 806 (1932).

Defendants' reliance on the elements of control and employment to show that the messenger is in reality the agent of the bank is misplaced. Such factors cannot alter the import of an unambiguous contract between the parties. What is evidentially created here is a dual

[6] Defendants' counterclaims also refer to Florida statute 659.52. No explanation as to this allegation has been offered. Furthermore, that section, which deals with banking business by unauthorized *persons,* appears on its face to be inapplicable to the situation presented in this case.

agency in which the messenger acts as agent for the customer for certain purposes and for the bank in other respects.

The record indicates that the off premises receptacle is used as a storage place for cash and other items until they are picked up by the messenger, an arrangement analogous to night-depositories found at most banks. It is well settled that the placement of funds in such depositories does not create a depositor-depositee relationship but rather one of bailor-bailee. *Bernstein v. Northwestern National Bank*, 157 Pa. Super. 73, 41 A2d 440; 10 Am. Jur. 2d, § 358.

Once it is established that the activities in question here do not constitute branching it is not difficult to conclude that they are not "the general banking business" off premises in violation of 12 U.S.C. 81. The United States Supreme Court has held that

> . . . The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important —is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. *Merchants Bank v. State Bank*, 77 U.S. 604, 650, 651 (1870).

And in 1911, The Attorney General of the United States, in considering whether national banks had power to establish branches said

> These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.
>
> That such a distinction does exist in fact is obvious.

> An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution. 29 Ops. Atty. Gen. 81 (1911).

While not venturing any detailed observations on the question of competitive equality between the national and state banking systems it is clear that once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching. And defendants, in their pleadings, have not alleged the violation of Florida law in any other respect.

At the hearing on these motions defendants objected to the entry of summary judgment on the ground that a substantial dispute existed with respect to the manner in which First National Bank and its customers were actually implementing the arrangements discussed earlier in this Memorandum Decision. For this reason, it was argued, the matter should be set for trial so that complete evidence could be developed with respect to variation from the facts already established.

In declaring judgment on the issues involved in this partial summary judgment the Court passes only on the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect. The fact that in particular instances a customer or one of the bank's employees may have deviated from the authorized and established procedures does not detract from their lawfulness. The record affirmatively shows that the bank has actually carried out its declared intent

in the execution of the specific operation to a substantial degree. This is enough to entitle it to a judicial determination of legal efficacy in this declaratory decree action.

This Court does not intend to consider every transaction which has taken place since the messenger service was inaugurated in search of the occasion when the wrong transmittal slip was used or a customer delivered money to the messenger without a clear understanding that his deposit would not take place until the money reached the bank.

For instance, facts are before the Court with respect to an arrangement whereby the bank delivers change to its customers as part of a transaction in which cash or a check in the amount of the change delivered is presented to the messenger for deposit to a special change account not otherwise sufficiently funded. The Court is of the opinion that, at least insofar as such change is delivered in exchange for checks, this practice may amount to cashing checks off the bank's premises and to that extent is not approved by this Court. This may well require a showing of actual accounts being debited at the bank in advance of the service.

However, the Court is convinced from the record before it that the Comptroller's ruling is not in conflict with 12 U.S.C. 36 or 81 and that at least substantial compliance with that ruling is manifest in the record here.

The Court concludes that there is no genuine issue of material fact and that plaintiffs are entitled to partial summary judgment as a matter of law in accordance with Rule 56, Federal Rules of Civil Procedure.

Accordingly, order to this effect will be entered.

DATED this 6th day of May, 1967.

/s/ G. Harrold Carswell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

ORDER—FILED MAY 6, 1967

This matter having come on for hearing on the motions of plaintiff and plaintiff-intervenor for summary judgment and the Court having considered the memoranda of law submitted and the argument of the parties in open court, and the Court having determined, in accordance with Rule 56, Federal Rules of Civil Procedure, that there is no genuine issue of material fact and that plaintiff and plaintiff-intervenor are entitled to judgment as a matter of law with respect to their allegations that the messenger service and receptacle operations authorized by the United States Comptroller of the Currency and customarily conducted by the First National Bank in Plant City are not violative of 12 U.S.C. 36 and 12 U.S.C. 81, it is hereby

ORDERED, ADJUDGED and DECREED:

(1) That the motions of the plaintiff and plaintiff-intervenor for summary judgment with respect to the issues raised concerning the application of 12 U.S.C. 26 and 12 U.S.C. 81, be and the same hereby are GRANTED.

(2) That the remaining issues raised by the motions for summary judgment, that is, the validity of the defense interposed by intervenor-defendants with respect to the application of 12 U.S.C. 24 (seventh) to the services referred to in Paragraph 1 above and the authority of the State Comptroller to intervene in the affairs of national banks will be carried forward for further hearing and consideration by this Court, and will be made the subject matter of another and separate order.

DONE and ORDERED this 6th day of May, 1967.

/s/ G. Harrold Carswell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(Title omitted)

FINAL JUDGMENT—FILED JUNE 2, 1967

By its order of May 6, 1967, this Court granted partial summary judgment for plaintiffs for the reasons and to the extent set forth in that order and the accompanying memorandum decision. That order further stated that the question of the incidental powers of national banks pursuant to 12 U.S.C. 24 (seventh) would be the subject of a future order. The Court has now concluded that in view of the Court's disposition of the other issues raised a decision as to the effect of 12 U.S.C. 24 (seventh) is not appropriate or necessary, the Court declines to rule on that issue. Accordingly, the motion to strike that defense filed by plaintiff is moot. Therefore, the Court now enters final judgment as follows:

ORDERED, ADJUDGED and DECREED that

1. The First National Bank in Plant City was duly authorized by the Comptroller of the Currency of the United States to conduct armored car messenger and off-premises receptacle services consistent with the Comptroller's ruling 7490.

2. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not branches within the meaning of 12 U.S.C. 36 or in contravention of Section 659.06(1) (a) Florida Statutes.

3. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City do not violate 12 U.S.C. 81.

4. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not in violation of or in conflict with Florida law.

5. Although plaintiff First National Bank in Plant City is entitled to a decree permanently enjoining Fred O. Dickinson, Jr., Comptroller of the State of Florida from interfering with the bank's operation of its armored car messenger and off-premises receptacle services, the defendant State Comptroller has stipulated in open court his intention to abide this Court's order without necessity for further injunctive relief, permanent injunction will therefore be withheld.

It is further ORDERED, ADJUDGED and DECREED that the Court's order of May 6, 1967, granting partial summary judgment and the accompanying memorandum decision are hereby incorporated in full into this Final Judgment.

In view of the Court's disposition of this case as ordered above, it is further ORDERED, ADJUDGED and DECREED that to the extent not heretofore granted or denied, intervening defendants' motions to produce, and motions to strike be and the same hereby are denied, and that plaintiff-intervenors' objections to interrogatories and motion for protective order be and the same hereby are sustained,

It is further ORDERED, ADJUDGED and DECREED that the temporary injunction entered against the defendant State Comptroller pending final determination in this action is dissolved and that the plaintiff First National Bank in Plant City and Home Indemnity Company, as its bondsman, be and the same hereby are discharged from any liability under the bond in the amount of $2,500 previously required by this Court's order,

It is further ORDERED, ADJUDGED and DECREED that the Court's Order Staying Proceedings in Case No. 155831 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, pending final disposition of this matter, be and the same hereby is rescinded and set aside upon assurance by counsel for the defendant Comptroller that motion to dismiss will be filed promptly in that cause of action previously enjoined.

It is further ORDERED, ADJUDGED and DECREED that all counter claims filed by defendant and intervening defendants be and the same hereby are dismissed with prejudice and final judgment is hereby entered for plaintiffs and against defendant and intervening defendants.

DONE and ORDERED in Chambers at Tallahassee this 2nd day of June 1967.

/s/ G. Harrold Carswell
United States District Judge

PLAINTIFF'S EXHIBIT No. 1

THE ADMINISTRATOR OF NATIONAL BANKS

THE COMPTROLLER OF THE CURRENCY
(Seal) Regional Comptroller of the Currency
Sixth National Bank Region
1320 Fulton National Bank Building
Atlanta, Georgia 30303

August 31, 1965

Mr. Charles E. Futch, Jr.
Vice President and Cashier
The First National Bank in Plant City
Plant City, Florida 33566

Dear Mr. Futch:

In your letter of August 30, 1965 you inquire about a ruling of this Office pertaining to the operation of a mes-

senger or armored car service by a National Bank for its customers and others.

The Comptroller of the Currency, in paragraph 7490 of the Comptroller's Manual, has ruled that a National Bank may, in order to meet the requirements of its customers, provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer. Recently the Comptroller ruled that a National Bank which operates an armored car messenger service for its customers, may extend this service so as to operate between any subscribing merchant's place of business and the bank of his choice. The ruling also held that a National Bank may service other customers with the excess capacity of the armored car messenger service it provides primarily for its own customers. With reference to armored car messenger service for persons other than customers of the bank, your attention is directed to the entire ruling contained on page 580 of the June 1965 issue of *The National Banking Review*, a copy of which is attached.

Very truly yours,

/s/ Robert L. Schwind
Robert L. Schwind
Regional Counsel
Sixth National Bank Region

RLS:w

Enclosure

XV. *Messenger Service*

It has been noted that, to meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank.[6] The Comptroller has stated that deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises, and that a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

XII. *Messenger Service*

It has been held that a national bank which operates an armored-car messenger service for its customers, may extend this service so as to operate between any subscribing merchant's place of business and the bank of his choice.[27] The ruling also held that a national bank may service other customers with the excess capacity of the armored-car messenger service it provides primarily for its own customers. Although it was stated that a bank may conduct this service through its ownership and operation of an armored car, or through the organization of a subsidiary or other affiliate corporation, banks were cautioned that, irrespective of which means it uses, the service must be performed pursuant to an agreement which specifies that the servicing national bank is the agent of the subscriber and not the agent of the subscriber's bank.

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[6] *The National Banking Review*, 1, December 1963, p. 264.

[27] Previously, it was held that a national bank may provide messenger service by means of an armored car to meet the requirements of its customers. See *The National Banking Review*, 1, March 1964, p. 431.

Banks were also cautioned that before extending armored-car service, they should explore, with bank counsel, the question of whether the armored car would be operating as a common or contract carrier. It is possible that Federal law and licensing requirements will apply, particularly where armored-car service constitutes interstate commerce; in such cases, it is also possible that the laws of several states will apply.

PLAINTIFF'S EXHIBIT No. 2

(Seal)

UNITED STATES TREASURY

COMPTROLLER'S MANUAL FOR NATIONAL BANKS

LAWS

REGULATIONS

RULINGS

COMPTROLLERS MANUAL
for
National Banks

RULINGS
of the
COMPTROLLER OF THE CURRENCY

7490. Messenger service

To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is

considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

EXHIBIT "B"

(Seal)

THE FIRST NATIONAL BANK
In Plant City
Plant City, Florida

William M. Rickert
President

October 7, 1966

To All Shareholders:

By the time you receive this letter you probably have learned that our bank has entered a suit against State Comptroller Fred O. Dickinson, Jr. In order that you may know all the facts concerning this matter I will simply quote parts of correspondence with certain officials.

Letter dated August 31, 1965 from Robert L. Schwind, Regional Counsel, Sixth National Bank Region Administrator of National Banks

> ". . . The Comptroller of the Currency, in paragraph 7490 of the Comptroller's Manual, has ruled that a National Bank may, in order to meet the requirements of its customers, provide messenger service by means of an armored car or otherwise. . . ."

Letter dated June 29, 1966 from Robert L. Schwind, Regional Counsel, Sixth National Bank Region, The Administrator of National Banks

> ". . . A National Bank, as an incident to its banking business, may construct off of its premises a receptacle for the receipt of night bags containing cash and checks. . . ."

Letter dated September 28, 1966 from Fred O. Dickinson, Jr., Office of the Comptroller, State of Florida

> ". . . This letter is to request that you cease and desist any further plans for these proposed operations and/or current operations. . . ."

In seeking new ways to better serve our customers particularly those frequently transporting large sums of money to and from the bank, our Board of Directors authorized a purchase of an armored car and the rental of an area in the Plant City Plaza for the erection of a money receptacle. Wisely, as you can see by the above letters, the Board asked for and received approval from the Administrator of National Banks, the U. S. Official who charters and regulates national banks.

Shortly after the announcement of these services, we received the above letter from the State Comptroller. He is also the State Commissioner of Banking who charters and regulates state banks. His letter asking that these services cease and desist comes, we believe, with no justification. After careful consideration and with competent legal advice, the Board has by this suit decided to ask the court who has jurisdiction. They have also decided to continue to operate the armored car and open the money receptacle in the Plant City Plaza.

I am confident that the courts will rule favorably for us and that these services will continue. Several large accounts have already been opened as a direct result and you can be sure that the directors, officers, and staff are aggressively seeking new customers for our Bank Messenger Service.

Very truly yours,

/s/ William M. Rickert
William M. Rickert
President

EXHIBIT "C"

Bank Plans Unique Facility

PLANT CITY—Plans for a new "first in Florida" service to customers were revealed yesterday by William M. Rickert, president of the First National Bank in Plant City.

"As part of our 10th anniversary celebration now underway," Rickert told The Times, "we plan to inaugurate a two-in-one bank messenger service about the middle of next month." The bank will be 10 years old on Wednesday.

Step one of the new service involves a custom-made armored car "serving as a mobile drive-in window," Rickert reported.

"THE VEHICLE itself looks like any other armored car," Rickert continued, "but it will also have a few improvements such as a large plate glass window."

Rare Coins on Exhibit

Rare gold and silver coins, recovered from Spanish ships sunk in 1715, will be exhibited by the First National Bank in Plant City this Wednesday through Friday as part of its 10th anniversary celebration. The treasure will be displayed in the bank's off-premises drive-in building —the state's first such facility, completed early this year.

Attached to the vehicle also will be an exterior folding shelf which customers may use to write out bank deposit slips.

Riding in the armored car, according to Rickert, will be the driver and two tellers.

"Each day," the president explained, "First National will send this car to all of its commercial customers to collect deposits.

"Individuals may also place deposits in this car for transmittal to the bank."

AS THE SECOND phase of this service, Rickert said, First National has rented space for a "money receptacle" in the new Plant City Plaza shopping center that will open next month.

No bank employees will be on duty at this receptacle.

"This new service will be similar to our night depository," Rickert explained. "Collections will be made twice daily by the armored car, and customers will receive deposits slips by mail."

EXHIBIT "D"

(Seal)

THE FIRST NATIONAL BANK
In Plant City
Plant City, Florida

Charles E. Futch, Jr.
Vice President & Cashier

September 21, 1966

As we come into the busy fall season, you can enjoy Full Service Banking at your doorstep for as little as $3.00 per week! How? With the new *Bank Messenger Service* offered by The First National Bank in Plant City.

No longer will it be necessary for you to risk being held up on the way to or from the bank, or hold large sums of cash in your safe overnight. Regular calls at your business by our bank messenger service *armored car* can be scheduled daily with extra service for special occasions.

Sound good? On the basis of the response to the preliminary marketing survey, we are confident you will think the new service is great.

For doorstep service to your business, simply answer the questionnaire enclosed. A bank representative will call on you soon.

The armored car will be on display at the bank during our Tenth Anniversary Celebration the week of September 26. Hope you will have the opportunity to come by and see it.

Very truly yours,
/s/ C. E. Futch, Jr.
Charles E. Futch, Jr.
Vice President & Cashier

CEF:bc

Enclosure

EXHIBIT "E"—Page 1

AGAIN LEADING THE WAY

with another FIRST...

Bank Messenger Service

MOBILE SERVICE-provided with a custom-made glass-enclosed, armored truck, to pick up cash and checks and deliver money for change, payrolls, etc. A daily schedule of calls is being formulated.

STATIONARY SERVICE - at the new Plant City Plaza, conveniently located to serve stores and also regular bank customers. Actually First National is bringing banking services to you.

your companion in every banking need

OFFICERS

J.T. HAYNSWORTH
Chairman of the Board
WM. M. RICKERT
President
JOHN B. NEUNER
Vice President
CHESTER McDONALD
Vice President
CHARLES E. FUTCH, JR.
Vice President and Cashier
R.E. BRADBERRY
Assistant Vice President
WILLIAM A. WHITE
Assistant Vice President
WAYNE HICKEY
Assistant Cashier
LEON PELHAM
Assistant Cashier
MORTON RAINEY
Assistant Cashier
RONALD DANIEL
Assistant Cashier
RANDALL HINSON
Assistant Cashier
MRS. DORIS PREWITT
Assistant Cashier

DIRECTORS

CLAY C. CODRINGTON
MAURICE G. CRUM
ROBERT S. EDWARDS
DR. A. ROY ELLIS
H.M. GRIFFIN
J.B. HAWKINS
J.T. HAYNSWORTH
C.R. HOOKER
ED L. HOUSE
DR. JAMES B. HUTCHESON
CHESTER McDONALD
DR. W.G. MERIWETHER
JOHN B. NEUNER
WM. M. RICKERT

THE First NATIONAL BANK
IN PLANT CITY . . . . . FLORIDA

EXHIBIT "F"

—Photo by Gladys Jeffcoat

BANK'S NEW SERVICE—First National Bank is the second in Florida to inaugurate armored car service for commercial customers. Bill Meriwther, teller in charge of the car, is shown checking the vehicle.

* * * * * *

Armor Car Service Started By Bank

First National Bank has announced two new services designed "to bring the bank closer to customers," according to William M. Rickert, president.

These include an armored car, making First National the second bank in Florida to inaugurate such a service, and a money receptacle, the first in the state. Rickert said that permission for the services was approved by the Comptroller of Currency in Washington, D. C.

The armored car which will be part of a bank messenger service will be used primarily to serve commercial bank customers and will transport money to and from the bank.

Armed Guard

Rickert described the car as a "mobile drive-in", staffed by an armed guard and two tellers. It has a large window where customers may be served, and a communications system.

Construction of a money receptacle on the mall at the Plaza Shopping Center on S. Collins St. is ready for operation, Rickert said. It will open when the center is completed.

The money receptacle is a unit similar to a night depository and includes a desk and lobby area.

Money may be placed in the receptacle at any time, Rickert noted, and the armored car will transport it to First National at least twice daily.

The two new services were announced this week when First National is observing its 10th anniversary.

JUDGMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25173

FRED O. DICKINSON, JR., Comptroller of the State of Florida, ET AL., *Appellants,*

versus

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, ET AL., *Appellees.*

Appeal from the United States District Court for the Northern District of Florida

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(September 12, 1968)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for entry of a judgment in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, The First National Bank in Plant City, Plant City, Florida, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 12, 1968

Issued as Mandate:

OPINION.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25173

FRED O. DICKINSON, JR., Comptroller of the State of Florida, ET AL., *Appellants*,

versus

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, ET AL., *Appellees*.

Appeal from the United States District Court for the Northern District of Florida

(September 12, 1968)

Before TUTTLE and GOLDBERG, Circuit Judges, and HOOPER, District Judge.

GOLDBERG, Circuit Judge: This case involves a meshing process in our federalism as we observe two sovereigns competing for their legitimate spheres. The Comptroller of the State of Florida, supported by intervening state banks, contends that First National's shopping center receptacle and armored car messenger service constitute "branch banking" in violation of Section 659.06 (1) (a) of the Florida Statutes[1] and that the authority for engaging

[1] 659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the

in such activities is therefore denied by the specific terms of Section 36 (c) (1) of the National Banking Act, 12 U.S.C. 36 (c) (1).[2] First National, supported by the Comptroller of the Currency of the United States as intervenor, contends that its activities do not constitute "branching" as defined in Section 36 (f) of the National Banking Act[3] and therefore are not within the coverage of Section 36 (c) or Florida Section 659.06. The district court granted judgment for First National, stating explicitly: "Florida statute 659.06 (1) (a) is not operative or controlling in this instance." We conclude that in this instance Florida law is operative and controlling and reverse.

For the purpose of the disposition of this case on appeal and in view of our reversal in favor of the state comptroller, we adopt the statement of facts as presented by the United States Comptroller. The armored car service

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bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

* * *

[2] § 36 Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

(c) A national banking association may, with the approval of the Comptroller of Currency, establish and operate new branches: (1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;

* * *

[3] § 36 (f): "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

and off-premises receptacle at issue in this litigation were established in 1966. In August, 1965, First National inquired of the Comptroller of the Currency about the Comptroller's position on a national bank operating an armored car messenger service. The bank received a reply observing that such a service could properly be provided if the conditions established by the Comptroller's ruling in paragraph 7490 of the Comptroller's Manual were satisfied. Paragraph 7490 provides:

> To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

The bank subsequently inquired of the Comptroller of the Currency whether the bank could establish a receptacle at a shopping center for the receipt of night bags containing money and checks, which would be recovered daily from the receptacle by the messenger and taken to the bank for deposit. The Comptroller's regional counsel advised:

> A National Bank, as an incident to its banking business, may construct off of its premises a receptacle for the receipt of night bags containing cash and checks. The receptacle should contain thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice

> may also advise that adequate insurance coverage will be provided and proper security measures taken. Such a service would not constitute branch banking as defined in 12 U.S.C. 36 (f).

Relying on these letters, First National in September, 1966, began operating an armored car service and an off-premises receptacle. These services were established according to the procedures described below.

The armored car messenger service was provided to call at a customer's place of business to pick up cash and checks for the purpose of transporting them to First National's banking house, where they would be deposited to the customer's account. The customers who used the service all had an account with the bank. Prior to using the service they signed a "Comprehensive Dual Control Contract" which provided that First National's messenger transported the monies to the banking house as the agent of the customer. When a customer sent funds to the bank, he accompanied them with a transmittal slip on which he itemized them. The transmittal slip contained a "Contract" which provided that the bank was acting as the agent of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house." Both the transmittal slip and the Comprehensive Dual Control Contract provided that the bank was maintaining hazard insurance for the protection of the principal.

The messenger service was also used to transport cash to those customers who had signed the Comprehensive Dual Control Contract. The Contract provided that in this situation, also, the bank's messenger would be acting as the agent of the customer. Sums transported to the customer by this method were accompanied by a charge slip indicating that the customer's account had been charged

for the amount of the order. A common use of this service was the delivery of coins to be used as change by businesses.

The messenger service operated daily, six days a week. The armored car was owned by the bank, and operated by employees of the bank. The bank also purchased the insurance coverage for the operation. Customers were not charged for the service.

In a shopping center located one mile from its banking house, First National leased an area where it provided a secured receptacle for persons maintaining an account with the bank. The bank's customers who signed the "Comprehensive Dual Control Contract" were issued a key so that they could place night bags containing cash and checks in the receptacle. Additionally, other customers with an account at the bank could use the receptacle by placing their funds in the receptacle in an envelope containing the money and a transmittal slip. The envelopes and transmittal slips were provided at the receptacle. The envelopes stated that the funds transported were accepted in accordance with the contract printed on the transmittal slip, which was the same transmittal slip used with the armored car messenger service. In bold letters at the receptacle a sign stated:

> The messenger who will recover the funds in this receptacle twice daily is acting as the agent for the customer. The funds will not be deemed a deposit until delivered to the bank's premises at 302 W. Haines Street. Insurance coverage for the protection of the funds is provided by the First National Bank in Plant City.

The armored car transported the funds placed in the receptacle to the banking house.

Shortly after First National had placed the two services into operation, the State Comptroller advised the bank

that its armored car and shopping center receptacle activities violated Florida law and requested the bank to cease and desist from these operations. First National then brought this action for declaratory relief and an injunction against the State Comptroller, contending its activities were authorized by paramount federal law and thus could not be interfered with by the state authorities. The defendant state banks intervened on the side of the State Comptroller, and the federal Comptroller intervened as a plaintiff.

The district court, by a decision of May 6, 1967, awarded partial summary judgment in favor of First National and the federal Comptroller. The court ruled, as a matter of federal law, that the definition of "branch" in 12 U.S.C., § 36 (f) was exclusive, and that under that definition there was no "branch" involved here; thus the state law, incorporated into federal law by 12 U.S.C., § 36 (c), did not apply.

On June 2, 1967, the district court issued its final judgment, declaring that the messenger service and off-premises receptacle as authorized by the federal Comptroller were not branches within the meaning of 12 U.S.C., § 36 (and the related provision, 12 U.S.C., § 81) and did not violate Florida law. The court limited the judgment to declaratory relief and did not issue an injunction (due to the state Comptroller's stipulation of intent to abide by the district court's order without further injunctive relief).[4]

The controlling issue of law in this appeal concerns the district court's choice of law, i.e., that court's failure to consult state law in determining whether First National's

[4] The above statement of facts is found at pp. 2-8 of the United States Comptroller's appellate brief. Contestations of these facts concern the extent of First National's continuous compliance with the above procedures relating to contract and agency. We do not find such disputes relevant in light of our decision.

activities outside its main offices constitute "branch banking." Our answer to that issue will require an excursion into statutory history and case and statutory analysis.

Justice Clark, in *First National Bank of Logan, Utah* v. *Walker Bank & Trust Company*, 1966, 385 U. S. 252, 87 S.Ct. 492, 17 L. Ed. 2d 343, capsulates the early history of our national banking system, which was born in anguish and stunted in its early growth. Competition between state and federal banking systems was bound to breed conflicts, and until 1927 federal banks were handicapped considerably by the lack of statutory authority to establish branches, even in states which allowed branch banking. See *First National Bank in St. Louis* v. *Missouri*, 1924, 263 U.S. 640, 44 S.Ct. 213, 68 L. Ed. 486.[5] In 1927 Congress passed what became known as the McFadden Act, which sought to relieve federal-state abrasions through statutory complementarianess. The McFadden Act permitted national banks to establish branches inside the municipality of the main bank, provided that the state in which the bank was located allowed branch banking. Extended in 1933 to grant certain additional branching powers, the 1927 Act forms the basis of the present Section 36 (c) of the National Banking Act.

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[5] Although the actual holding in that case was the application of a state anti-branching statute applicable to a national bank within that state, the Court at one point in its opinion did deny the existence of any national bank's authority to establish a branch. 263 U.S. at 656-58. Moreover, later in the opinion the Court commented:

> "[N]ational banking associations have gone on for more than half a century without branches, and upon the theory of an absence of authority to establish them. If the nonexistence of such branches, or the absence of power to create them, has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as Federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission." 263 U.S. at 659.

In the *Walker Bank* case, supra, Justice Clark, after concluding his historical analysis of the National Banking Act, returned to consideration of the present statute with the following words:

> "It appears clear from this resume of the legislative history of § 36 (c) (1) and (2) that Congress intended to place national and state banks on a basis of '*competitive equality*' insofar as branch banking was concerned." 385 U.S. at 261. [Emphasis added.]

The United States Comptroller in *Walker Bank* had argued to the Supreme Court that if state law allows *any type* of branching, the prohibitions in Section 36 (c) are not applicable and, therefore, national banks may establish branches in violation of specific state regulations. Justice Clark's analysis demonstrates the Court's overwhelming acceptance of the philosophy of "competitive equality":

> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.' Utah clearly permits it 'only to the extent' that the proposed branch takes over an existing bank.
>
> "The Comptroller also contends that the Act supersedes state law only as to 'whether' and 'where' branches may be located and not the 'method' by which this is effected.
>
> "We believe that where a State allows branching only by taking over an existing bank, it expresses as

much 'whether' and 'where' a branch may be located as does a prohibition or a limitation to the home office municipality. *As to the restriction being a 'method,' we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of § 36 (c) (1) and (2), regardless of the tag placed upon it.*" 385 U.S. at 261-62. [Emphasis added.]

The philosophy of "competitive equality" clearly had been dominant in the minds of the 1927 and 1933 legislators; however, before *Walker Bank*, courts had sometimes subordinated it to the desire to adhere to federal law. See *First National Bank of Smithfield* v. *Saxon*, 4 Cir. 1965, 352 F.2d 267, 271-72 (which the Supreme Court in *Walker Bank* expressly found to be in conflict with the decisions which it was affirming); *Camden Trust Co.* v. *Gidney*, D.C. Cir. 1962, 301 F.2d 521, cert. den., 369 U.S. 886, 82 S.Ct. 1158, 8 L. Ed. 2d 287 (in which the Court refused to classify a "new" bank as a branch, and in doing so completely ignored the contention by the State of New Jersey, in an amicus brief, that permission for such operation would not be granted to a state bank); *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, D.C. Cir. 1963, 323 F.2d 290, reversed on other grounds, 1965, 379 U.S. 411, 85 S.Ct. 551, 13 L. Ed. 2d 386 (in which the Court classified a "new" bank as a branch, but did so without reference to state law); *Jackson* v. *First National Bank of Valdosta*, M.D. Ga. 1965, 246 F. Supp. 134, 138 (in which the Court stated specifically: "This court is convinced that in construing the definition of 'branch' found in 12 U.S.C.A., § 36 (f) it should be guided by federal considerations").[6]

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[6] A persuasive argument against complete "competitive equality" as to branch banking can be found in Comment, "Federalism in Interpretation of Branch Banking Legislation," 32 *U. Chi. L. Rev.* 148 (1964). The author in this pre-*Walker Bank* Comment urges that federal courts adopt federal definitions of the term "branch"

Following the above authority, First National attempts to convince us that Section 33 (f) of the National Banking Act is still the sole and monolithic definer of "branch." Then, by taking us through some labyrinthian and meandering paths of the laws of agency and contract, First National seeks to demonstrate that it has not established offices or agencies, where, as specified in Section 36 (f), "deposits are received, or checks paid, or money lent." Such a line of argument, even before *Walker Bank*, would not have been acceptable in our Circuit. Now it is indefensible.

In 1965 our Court held that courts must not look to Section 36 (f) as their sole guiding light but must permit rays of state law to refract and reflect their statutory vision. In *Jackson* v. *National Bank of Valdosta*, 5 Cir. 1965, 349 F.2d 71,[7] we quoted Section 36 (c) and Section 36 (f) and then concluded:

> "Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office. In this way, Congress sought

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based essentially on the economical realities of banking. Although well-reasoned and well-documented, the Comment fails in its attempt to justify its position in regard to the National Banking Act, and specifically Section 36 (c). Compare Note, 64 *Mich. L. Rev.* 155 (1965) which espouses the philosophy of "competitive equality." See also Comment, "Branch Banking: The Current Controversy," 16 *Stanford L. Rev.* 983 (1964), which pictures the relatively recent re-emergence of this issue into the political arena. In Comment, "Present Banking Structure in Florida and Branch Banking," 20 *Florida L. Rev.* 84, 98-101 (1967), the authors relate the *Walker Bank* decision to current Florida law and even mention the opinion of the district court in the case at bar.

[7] Our opinion in *Jackson* preceded the district court's published opinion on remand, cited *supra*. As is evident from our excerpts from the two opinions, the distinguished district judge at that time espoused a different view as to the priorities of branch banking legislation than that expressed in the opinion by our Court.

> to insure equality between state and national banks regarding the establishment of branches." 349 F.2d at 72.

After quoting the applicable state statute, we continued.

> "Therefore a state bank, located at Valdosta, already having one office or facility in that city, could not open another office or facility there. Consequently, First National likewise could not, under § 36 (c), open such a facility." 349 F.2d at 73.

Finally, in discussing the application of Section 36 (c), we espoused what was later to be adopted by the Supreme Court as the policy of "competitive equality":

> "That statute [Section 36 (c)] is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and South Dakota, supra [*South Dakota* v. *National Bank of South Dakota*, D.S.D. 1963, 219 F. Supp. 842] at 846, that Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct *'policy of equalization'* for our dual banking system." 349 F.2d at 74. [Emphasis added.]

Our opinion in *Jackson* was relied on extensively in *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, W.D. Wash. 1966, No. 6338 (unpublished memorandum decision), a case in which the exact legal issue at bar was squarely before the court. Unfortunately Judge Lindberg's scholarly analysis, which was written before the *Walker Bank* decision, was never published. We therefore quote from it liberally:

> "The issue on the merits is whether the proposed drive-in facility is an illegal branch of a national bank

under the provisions of 12 U.S.C., § 36. The conditions upon which a national banking association may establish and operate a branch, as set forth in section 36, in effect incorporate state laws. These state laws relate to the establishment and operation of branches as authorized to state banks. Therefore, in construing federal law, the court must also construe the pertinent banking laws of the State of Washington." p. 15.

* * * *

"The scope of the term 'branch' is set forth in section 36 (f). That section states the term 'branch' shall be 'held to include any branch bank, branch office * * * additional office * * * at which deposits are received or checks paid, or money lent.' Some writers have considered this section as defining the word 'branch.' Judge Holtzoff referred to this subsection as a definition [in *Michigan National Bank* v. *Saxon*, D.C. 1962, Civil No. 82162 (unpublished opinion)] and so did Judge Bootle [in *Jackson* v. *First National Bank of Valdosta, supra*]. It is with much respect and deference that I venture to disagree with their characterization. I feel that the section should not be given the prestige of a definition if it does not meet the standards of a definition. Congress has nearly two hundred years of experience in enacting statutory definitions. If that body had wished to formulate a true definition I do not believe that the term defined would have appeared as both the subject and the predicate of the definition. Further, the opening paragraph of section 36 clearly indicates that the section was not intended to provide any definitions as such. It states:

> 'The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:'

Subsection (c) [sic] of Section 36 may be a partial definition or a description of what *may be* included within the term 'branch.' It was not intended to be exhaustive. It provides only a broad, functional measuring gauge of what a branch may be. As I read it, the words 'additional office * * * at which deposits are received, or checks paid, or money lent,' provide only a partial, functional definition for determining *prima facie* if the supplementing state branching law should come into play. This is what I feel is the import of the Court of Appeals' decision in *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71.

In the *Valdosta* case the state superintendent of banking, by issuing regulations, chose to expand somewhat this partial definition of 'branch.' The regulations provided that if the drive-in teller facilities were within the boundaries of a single contiguous area, or were across the street but connected by a tunnel or overhead passage, it would not be considered as a branch; it would instead be considered as an expansion of the existing facility. Therefore, when looking at a new national bank facility in Georgia the Comptroller is *required* (by the *Georgia* law) to consider contiguity and physical connection; these may determine the character of the facility. This decision makes it fairly clear that once the facility passes the broad functional test set forth in section 36 (f) the state law takes over and may further define 'branch' in such a way as to comport with the state's banking policy. This was precisely the purpose Congress had in mind when it passed the McFadden Act. See *Walker Bank & Trust Company* v. *Saxon,* supra [the case which was later affirmed by the Supreme Court]. The *Walker* case also emphasized the role of state law in branching by saying, 'We believe the proper approach is for the Comptroller to look at all the State law on branch

banking not just part of it.' Id. p. 94. But see *First National Bank of Smithfield* v. *Saxon*, 352 F.2d 267, 271 (4 Cir. 1965) [see our mention of this case, *supra*, and its treatment by the Supreme Court in the *Walker Bank* decision].

The test of 'branchness' in this situation is therefore twofold—(1) Does the facility fit the broad functional definition laid down by Congress in Section 36 (f), and if so, (2) Does the state law add many more refinements to the definition?

Although defendant argues that Peoples Bank fails to meet the requirements of section 36 (f), it admits (or rather does not contest) the fact that the proposed facility will receive deposits and pay checks. However, the defendant asserts that 'only a part'—25%—of the check-cashing process will be carried out at the proposed facility. They claim that the physical acceptance of the check and payment of the money to the payee constitute only about 25% of the operations connected with check cashing. The remaining operations, such as entry on the books and transmittal of the instrument to the drawee bank, make up the other 75% of the check cashing process. That may well be. However, the check is nevertheless cashed within the meaning of section 36 (f) when the instrument is accepted from and the money paid to the holder. The remaining operations are done so that the transaction is reflected on the books of the bank and to insure that the cashing bank is repaid by the drawee bank.

When the bank accepts the instrument and pays the holder the check is 'cashed,'—*all* cashed, not 25%, or 50%, but 100% cashed. True, the remaining operations are part of the *check-cashing process*, but the act of check-cashing is complete after receipt of the check and payment of the money; and it is the *act* of check-cashing that is contemplated by section 36 (f).

The reason for making this distinction is because the defendant in argument attempted to equate the act of check-cashing with the process of check-cashing. They are not identical. This effort at blurring the differences was apparently done for the purpose of showing 'oneness' between the new facility and the principal office at 222 Williams Street. However, 'branchness' is a combination of function and physicality—not bookkeeping. See *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134 (D. Ga. 1965). And any effort to inject the 'unity of operation' test into this case is merely another attempt to avoid confrontation with state law. This test was rejected by the district court in *Bank of Valdosta* and under banking laws more liberal than those in the State of Washington.

Having discussed functional characteristics under the federal statute, we now turn to the physical aspect. *Prima facie,* can the proposed facility be properly termed an 'additional office?' If it can, we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character. This proposed facility is some 260 feet or more from the principal office, on a separate lot, in another block, across a busy thoroughfare, has a different address, and is in a completely disconnected building. No stretching of the term 'additional office' is required at all to see it fits perfectly. The proposed facility is therefore a 'branch' within the meaning of the federal statute (12 U.S.C., § 36 (f)).

From this point forward, the state statutes and their interpretation as applied to state banks and their branches become the controlling law in determining whether this facility is to be considered a branch or not. This has been plainly stated as noted earlier in this opinion in *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71, and *Walker Bank & Trust Com-*

pany v. *Saxon, supra.* The rest of the inquiry is therefore confined to ascertaining what category this facility falls into if it were being constructed solely under the dominion of state law." pp. 21-25.

• • •

"It is a branch.

It is a branch and it would seem that the Comptroller would have found it to be a branch if he had measured this proposal by the state law of Washington. But he did not. He ignored it, as the Deputy Comptroller stated in his testimony on the stand. In deciding upon the character of this structure the Comptroller did not even consider state law. His apparently deliberate non-observance of the state law was arbitrary, not in accordance with the law, not in accordance with the procedure required by the law, and unwarranted by the facts. See *Bank of Valdosta,* 349 F.2d 71." pp. 28-29.

The above analysis by Judge Lindberg represents an accurate and perceptive application of our statement of policy in *Jackson,* and we subscribe to it without hesitation. We do so on two important grounds. First, we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language. Second, we will not choose to overlook state law in penumbral areas when the thrust of the National Banking Act is "competitive equality" between national and state branching authority.

Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36 (f) Congress provided only that the term "branch" "shall be held to include" these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it

merely sets out in general terms what everyone knows to be the life-blood functions of banking. If we construed Section 36 (f) as permitting paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths. We repeat the words of Judge Gewin, speaking for our Court en banc, in *Miller* v. *Amusement Enterprises, Inc.*, 5 Cir. 1968, 394 F.2d 342, 353:

> "We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment. Our system does not favor mechanical jurisprudence; it seeks to find the purpose and spirit of a statute and the intention of its makers. Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L. Ed. 226, 228; National Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612, 87 S.Ct. 1250, 18 L. Ed. 2d 357, 364."

See also *Lawson v. Suwanee Fruit & Steamship Co.*, 1949, 336 U.S. 198, 200-201, 69 S.Ct. 503, 93 L. Ed. 611, 614-15, applying the above principles to statutory definitions.

Having concluded that Congress did not seek to devitalize Section 36 (f) with enternally static concepts, we likewise conclude that flexibility is to be accorded not by any federal common law of branching, but rather by recourse to state law. To hold otherwise would violate the specific teachings of *Jackson* and *Peoples National Bank* and would severely challenge the policy of "competitive equality" which the Supreme Court has so recently established. It would allow the United States Comptroller, by means of oracular definitions, to distort what states believed was banking into non-banking. To be sure, national banks may well fear the authority of state comptrollers to make extreme use of this same defining process, but their recourse

must be to Congress which legislated "competitive equality," not to the courts who must follow it.

Although there are acerbities and exacerbations natural to our dual banking system, Congress has sought to provide competitive access to the marts of banking. The Congressional enactments do not assure economic equilibrium, but they do assure a measure of equality of economic opportunity. We therefore refuse to tread the twisting paths of agency and contracts urged upon us in this case and look instead to the laws of Florida.

Section 659.01 (1) (a) of the Florida Statutes, note 1 *supra*, is quite broad in stating that a bank "shall have only one place of doing business." As yet, no court opinion has considered the applicability of this statute to receptacle and armored car services, although a similar action is now pending in a Florida state court. *Dickinson v. The Tallahassee Bank and Trust Co.*, 2d Jud. Cir., Leon County No. 68-30.[8] The Comptroller of the State of Florida, however, in his letter to the First National dated September 28, 1966, specifically ruled that "these two activities are in violation of Section 659.06 (1) (a), Florida Statutes." Such a ruling may sometimes constitute the only "law" of the state, cf. *United States* v. *Howard*, 1957, 352 U.S. 212, 77 S.Ct. 303, 1 L. Ed. 2d 261, and we should follow it when, as here, it appears consistent with the policy of the state statute. See *Jackson* v. *First National Bank of Valdosta, supra*, 349 F.2d at 73.[9]

The Florida statute permits only one place of business, and this direction is uncomplicated, unhedged, and unmodi-

[8] On January 18, 1968, the state court approved a request for a form of abstention-in-reverse and reset the final hearing in its case until after our Court had interpreted the Florida statute in the case at bar.

[9] Compare *Leuthold* v. *Camp*, D. Mont. 1967, 273 F. Supp. 695, 699 (at [11]), where that court found that the Montana Attorney General's ruling was inconsistent with the applicable state statutes.

fied. "Doing business" in Florida can be minimal. Cf. *Phillips* v. *Hooper Chemical Corp.*, 5 Cir. 1967, 375 F.2d 189. Unless we were to cast away all concepts of the functional "business" of a bank, we would have to conclude that First National was "doing business" with its extra services.

As is indicated by the pending litigation, our opinion will probably not be the final interpretation of Florida law as it relates to the activities in question. On remand, therefore, the district court should enter a conditional decree in order that the judgment in this particular controversy is not deemed res judicata in the event of a conflicting statutory interpretation by the Florida state courts. Such remedy was clearly provided for in *Burton* v. *State Farm Mutual Automobile Ins. Co.*, 5 Cir. 1964, 325 F.2d 317, 324, where Judge Brown stated:

> "[W]here things depend on the outcome of litigation elsewhere, or future developments as to controlling substantive or procedural law, the Federal Court has the power—and the duty where appropriate—to enter a conditional order or decree."

The district court should retain jurisdiction, and if Florida law is ultimately determined to be different than here expounded, the court can re-lense its optical view of First National's activities as they relate to Section 36 (c) of the National Banking Act.

Reversed and Remanded for entry of a judgment in accordance with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 777, October Term, 1968

WILLIAM B. CAMP, Comptroller of the Currency of the United States,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, Et Al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Jan. 10, 1969.

/s/ Hugo L. Black,
Associate Justice of the Supreme Court of the United States.

Dated this 9th day of December, 1968.

SUPREME COURT OF THE UNITED STATES

No. 777, October Term, 1968

THE FIRST NATIONAL BANK IN PLANT CITY
Plant City, Florida,
Petitioner,

v.

FRED O. DICKINSON, JR., ETC., ET AL.

ORDER ALLOWING CERTIORARI
—FILED FEBRUARY 24, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 932 and a total of one hour is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

Supreme Court of the United States

No. 932 ----- , *October Term, 19* 68

William B. Camp, Comptroller of the Currency,

Petitioner,

v.

Fred O. Dickinson, Jr., etc., et al.

ORDER ALLOWING CERTIORARI. Filed February 24 ------ , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth ---------- Circuit is granted. The case is consolidated with No. 777 and a total of one hour is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

FILE COPY

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 19

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA; EX OFFICIO COMMISSIONER OF BANKING

and

THE HILLSBORO BANK; FIRST RUSKIN BANK; AND PEOPLES BANK OF LAKELAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 25, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

THE FIRST NATIONAL BANK IN PLANT CITY,
PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA; EX OFFICIO COMMISSIONER OF BANKING

and

THE HILLSBORO BANK; FIRST RUSKIN BANK; AND PEOPLES BANK OF LAKELAND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The First National Bank in Plant City petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered September 12, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A to this petition (infra, pp. 1a-19a) is unreported. The opinion of the district court (App. A, *infra,* pp. 21a-31a) is reported at 274 F. Supp. 449.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1968 (App. A, *infra,* p. 20a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a national bank may be precluded by state law from engaging in activities which are authorized by provisions of the National Bank Act, 12 U.S.C. 21 et. seq., which do not specifically incorporate state law.

2. Whether activities of a national bank other than those described at 12 U.S.C. 36(f) may properly be considered branching within the meaning of the National Bank Act.

3. Whether, in construing 12 U.S.C. 36(c) a federal court may look to either the interpretation of a state official or the decision of a state court for a determination as to the meaning of the statute law of the state in question.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are 12 U.S.C. 36(c) and 36(f) and section 659.06(1)(a), Florida Statutes. They are printed in App. B., *infra,* pp. 35a-36a. The regulation involved is ¶ 7490 of the Comptroller of the Currency's Manual for National Banks (App. B., p. 36a).

STATEMENT

Petitioner, The First National Bank in Plant City (hereafter First National), is a national banking association organized and operated pursuant to the National Bank Act, 12 U.S.C. 21, et seq., with its only office in Plant City, Florida. The dispute in this case arises out of an attempt by the Florida Banking Commissioner, on the basis of state law, to prohibit petitioner from engaging in an activity which is authorized to national banks by the National Bank Act.

Pursuant to ruling No. 7490[1] of the Comptroller of the Currency, who is the supervisor of national banks, First National began on October 3, 1966 to offer a messenger service to assist its customers in transporting cash and other items to and from the Bank for deposit or withdrawal. Briefly, the messenger service functions as follows.[2]

First National owns an armored car which is driven by an employee of the bank. Customers of the bank, primarily those operating commercial establishments, may contract with the bank for regular or occasional pick-up and delivery of funds. Customers using the service must enter into a "Comprehensive Dual control Contract" with the Bank which provides, among other things, that the Bank is acting as agent for the customer in transporting the money. In addition, transmittal slips, which provide that monies picked up by the messenger are not deemed to be deposited until

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[1] Comptroller's Manual for National Banks, § 7490, App. A, infra, p. 36a.

[2] The operations are described in more detail at pp. 396-440, 458-503 and 512-564 of the original record in the Court of Appeals (hereinafter designed as "R").

received by tellers at the banking house, accompany each pick-up. The Dual Control Contract and a "debit memo" provide that funds delivered to customers must have already been charged against their accounts before the delivery.

First National also maintains a concrete receptacle, similar to a night depository, in a local shopping center. Items for pick-up by the messenger may be placed in the receptacle together with the same form of transmittal slip used for direct pick-up.

Shortly before inauguration of its messenger service, First National received a letter from the Deputy Commissioner of Banking of the State of Florida [3] advising the Bank that the service was in violation of Section 659.06(1)(a), Florida Statutes [4] and threatening "legal proceedings" unless the Bank should "cease and desist" from the proposed operation.

In order to forestall the threatened "legal proceedings" and to remove the cloud which the State Commissioner had created with respect to the messenger service, First National, on October 7, 1966, brought this action against the Commissioner for declaratory judgment and injunctive relief in the United States District Court for the Northern District of Florida.

The complaint asked, *inter alia,* for declaratory judgment that First National was subject to the paramount federal law respecting national banks and that any state law or interpretation of state law must yield when in conflict with the federal declaration of national

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[3] The letter is reproduced at R. 2096.

[4] Section 659.06(1)(a), Florida Statutes is reproduced in Appendix A at p. 35a-36a.

bank powers. First National also asked the court to declare judgment that its messenger and receptacle services were not in violation of Section 659.06(1)(a), Florida Statutes. Finally, the complaint sought judgment that state officials have no authority to supervise national banks and requested an injunction to prevent the State Commissioner from further interfering in the operations of plaintiff's business.

Defendant's answer asserted that the Florida statute is made binding on First National by 12 U.S.C. 36(c) (App. B., p. 35a) and that the messenger service is also in violation of 12 U.S.C. 81.[5]

Following hearings on numerous motions and the intervention on the side of First National by the United States Comptroller of the Currency and by three state banks on the side of the State Commissioner, the District Court, on May 6, 1967, granted summary judgment for First National and the federal Comptroller "with respect to the issues raised concerning the application of 12 U.S.C. 36 and 12 U.S.C. 81" (App. A., p. 31a). In an accompanying Memorandum Decision (App. A., pp. 21a-31a) the District Judge ruled that the National Bank Act, at 12 U.S.C. 36(f),[6] contains an "exclusive definition" of the term "branch" and that

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[5] § 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

[6] (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

the activities performed through First National's messenger service do not constitute branching within the terms of that definition. The Court found further that the service in question was not "the general banking business" off premises in violation of 12 U.S.C. 81. With respect to the effect of Florida law in the matter, the Court held that "once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching."

Final judgment, incorporating the Order and memorandum of May 6, and disposing of several remaining points was entered June 2, 1967.

All defendants appealed and the Court of Appeals, following full briefing and oral argument, reversed the District Court on September 12, 1968.

The Court of Appeals' opinion dwelled almost entirely on what it described as the "meshing process in our federalism as we observe two sovereigns competing for their legitimate spheres" (App. A., p. 1a). Relying primarily on its view of this Court's decision in *First National Bank of Logan, Utah* v. *Walker Bank & Trust Company,* 385 U.S. 252 (1966), and on a District Court opinion from the state of Washington,[7] the Circuit Court decided that "in this instance Florida law is operative and controlling" (App. A., p. 3a). The Court concluded its analysis by noting that the Florida statute in question did not deal specifically with the kind of service performed by First National but that the Court "should follow" the interpretation

[7] *State Chartered Banks in Washington* v. *Peoples National Bank of Washington,* W.D. Wash., 1966, No. 6338 (unpublished memorandum decision, R. 1839 et seq.).

thereof by the State Banking Commissioner (App. A., p. 18a). The Court thereupon remanded the case for entry of a conditional decree in the event "Florida law is ultimately determined to be different than here expounded" (App. A., p. 19a).[8]

REASONS FOR GRANTING THE WRIT

The Court of Appeals wrongly relied on state law rather than on the applicable federal law in passing on the legality of the operations of petitioner, a national bank. The effect of this decision will be to allow each state to prohibit any off-premises activity of a national bank simply by defining such activity as a branch even though the National Bank Act defines "branch" in different and conflicting terms.[9] Moreover, in arriving at its decision the Court depended heavily on what, we submit, is a distorted and erroneous extension of this Court's decision in the *Walker Bank* case, *supra*. Finally, the decision below is in direct conflict with decisions of the United States Courts of Appeals for the Distrcit of Columbia and the Third Circuits.

1. An Important Federal Question Is Involved

The Court of Appeals stated that "the controlling issue of law in this appeal concerns the district court's choice of law, i.e. that court's failure to consult state

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[8] A case raising the issue of the meaning of the Florida Statute is currently pending in a Florida State Court; *Dickinson* v. *The Tallahassee Bank and Trust Co.*, 2d Jud. Cir. Leon County No. 68-30.

[9] Within the last two months the Attorney Generals of Texas and Oklahoma have ruled that so-called "deposit machines" are illegal branches under the laws of those states.

law. . ." (App. A., p. 7a). The Circuit Court then decided the appeal on the basis of a state official's interpretation of Florida law. The decision thus ignored the principle, which has been established since the earliest judicial construction of the National Bank Act, that the powers of national banks are given and withheld only by federal legislation unless a specific deferral to state law is incorporated in a federal statute. This Court has repeatedly held, as it did in *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 557, that national banks "are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit." See also *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896); *Easton* v. *Iowa*, 188 U.S. 220 (1903); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-559 (1963).

The only exception to the preeminence of federal law with respect to the activities of national banks is where Congress has "by express language" made a particular phase of national banking subject to state restrictions. *Franklin National Bank* v. *New York*, 347 U.S. 373, 378 (1953). As the *Franklin* case makes clear, however, such exceptions must be specifically intended by Congress and are not to be implied where a conflict with federal law would result. The decision of the Court of Appeals violates this long standing system for the governance of national banks.

No federal statute directs reference to state laws in connection with a national bank's power to render services such as those involved here. It is clear from this Court's decision in *Merchants Bank* v. *State Bank*,

77 U.S. 604 (1870), and from opinions of the Attorney General of the United States, 29 Ops. Atty. Gen. 81,[10] that this kind of agency activity is authorized to national banks as an incident to their banking business pursuant to 12 U.S.C. 24 (seventh). These same authorities make it clear that the service in question was authorized to national banks long before they were given the right to operate branches in 1927 and 1933. Accordingly, there is, as the District Court held, no occasion for reference to the branching sections of the Act (12 U.S.C. 36(c)), in order to find authority for First National's messenger service.[11]

The Court of Appeals' decision to adopt state law in deciding what activities a national bank may conduct away from its premises will be profoundly disruptive of the operations of the nearly 5,000 national banks in the United States. In addition, to messenger services of various kinds, national banks conduct a wide variety of activities away from their main and branch offices. Highly significant functions such as data processing

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[10] Cited with approval in *First National Bank* v. *Missouri*, 263 U.S. 640, 658 and at n. 1, p. 658.

[11] Much of the briefing and most of the oral argument in the Court of Appeals was devoted to the question of whether First National's messenger operations constituted acceptance of deposits off the Bank's premises, thereby bringing the operation within the ambit of 12 U.S.C. 36(c). Appellees had cited numerous authorities making clear that deposit transactions are governed by contract. The contractual documents involved here specifically provided that the depositor-depositee relationship would not arise until the funds were actually received at the banking house. The District Court had determined that the messenger was not receiving deposits and apparently the Court of Appeals did not disagree inasmuch as the opinion is silent on this point.

and trust department facilities are frequently conducted at separate locations. The solicitation of new loan and deposit business is regularly engaged in throughout the country by virtually all of the major commercial banks. Correspondent services and credit card operations are unavoidably performed away from established bank branches. Loan and underwriting closings involving bank officers regularly occur off the bank's premises. Services of this kind are of increasing significance as bank operations grow more sophisticated and complex and bank customers more mobile and geographically dispersed.

It had always been clear, until the decision of the Court of Appeals in this case, that such off-premises services were authorized to national banks as part of their general powers under 12 U.S.C. 24 (seventh) and were subject to supervision only by the Comptroller of the Currency. The relatively complex procedures involved in procuring a branch certificate have been required, as the legislative scheme clearly intended, only in situations in which the bank proposed to perform one of the three fundamental banking operations which 12 U.S.C. 36(f) defines as branching: receiving deposits, paying checks or making loans away from the main office.

There are currently 14 states in which branching is totally prohibited and 21 more in which restrictions of various kinds are imposed on the right to branch. If the opinion of the Court of Appeals below were the law, state banking commissioners in these states could, at their discretion, determine that virtually any national bank activity performed off-premises was unlaw-

ful. In the remaining 15 states the State Commissioners could, in effect, require that national banks obtain branch certificates for each such activity. Such fears are not exaggerated. The Court of Appeals recognized that:

> "... national banks may well fear the authority of state comptrollers to make extreme use of the same defining process ..." (App. A., p. 18a)

But, while acknowledging this potential result of its opinion, the Court suggested only that national banks' "recourse must be to Congress" (App. A., p. 18a). A far more appropriate recourse is to this Court which petitioner now asks to restore the traditional limitations on state instusions into the national banking system.

2. Conflict With Walker Bank Decision

The primary justification offered by the Court below for applying state law to the question of which activities of a national bank may be performed by agents off-premises was this Court's decision in *Walker Bank, supra.* Referring to, what it calls, "the Court's overwhelming acceptance of the philosophy of 'competitive equality'", (App. A., p. 8a) the opinion below reasons that lower courts "must permit rays of state law to refract and reflect their statutory vision" (App. A., p. 10a) not just where state law is specifically adverted to in the federal statute but as a general method and judicial approach to determining the limits of national bank powers. Petitioner submits that such a holding extends the *Walker Bank* decision far beyond its intended reach and throws into confusion and

grave doubt many of the essential activities of national banks throughout the country.[12]

The question upon which this Court granted certiorari in *Walker Bank* was stated as follows:

> Whether, in authorizing the establishment of a branch office by a national bank, the Comptroller of the Currency is bound by a provision of State law that permits a State bank to establish a branch only through the acquisition of an existing bank.[13]

The question arose out of a dispute as to the scope of 12 U.S.C. 36 which provides "the conditions upon

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[12] The expansion of the *Walker Bank* opinion and the potential for disruption of national bank activities have been quickly recognized. In an October speech to the National Association of State Bank Supervisors, the Association's General Counsel said:

> Perhaps the most significant extension of the competitive equality doctrine of the Walker Bank case, however, came last month in the Dickinson decision of the Fifth Circuit. Many lower courts have held that the sole definition of a branch binding on the Comptroller is that contained in Section 36(f) of the National Bank Act. Not so, said the court. That is only a partial definition and then the Comptroller must look to state law by which he is bound . . .
>
> In other words, state branch definition, binding on national as well as state banks, may be made by the State Bank Supervisor, through interpretation or regulation, in the absence of a clear-cut statutory definition, or of an authoritative state court or Attorney General ruling. The Dickinson decision thus establishes state law as the standard for determining whether mobile offices, drive-in facilities, or, as I shall mention in a moment, loan production offices, are branches to be permitted, prohibited, or restricted by state law. Speech of James F. Bell, *American Banker*, November 12, 1968, p. 4, col. 2-3.

[13] This is the statement as set forth in the Government's petition in *First Security Bank* v. *Commercial Security Bank*, a companion case to *Walker Bank*. The government's petition in the *Walker* case adopted its petition in *Commercial Security*. The cases were decided by a joint opinion.

which a national banking association may retain or establish and operate a branch . . ." Section 36(c) declares that "New branches" may be approved only if "such establishment" would be authorized to State banks by the State's law. The national bank activity which provided the controversy in *Walker* was undeniably a branch. The bank had been issued a branch certificate and it was clearly intended that the branching functions set forth in the federal definition at 12 U.S.C. 36(f) would be performed. The only question before the Court, therefore, involved the degree to which state law was made applicable by Section 36(c) to an operation which was within the 36(f) definition of branch.

In its discussion of 12 U.S.C. 36 this Court in *Walker Bank* concentrated on the legislative history surrounding the question of whether national banks should be permitted to operate branches as such offices were generally known to operate and as they were subsequently defined at 12 U.S.C. 36(f). No references appear in the *Walker Bank* opinion to other phases of national bank operations and it is clear from the legislative history of 12 U.S.C. 36[14] that no other activities were

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[14] There is an extensive history of Congressional activity leading to enactment of the McFadden Act of 1927, 44 Stat. 1224 permitting national banks to branch in their home office cities and of the Banking Act of 1933 (Glass-Steagall Act), 48 Stat. 162, containing the rest of the branching provisions now contained at 12 U.S.C. 36. Most of the debate centered on the dispute between branch banking as opposed to unit banking. Much of the rest of the legislative history is devoted to the need to strengthen the national banking system which was at a severe disadvantage by being statutorily precluded from branching. There is no indication in the history of these two acts that Congress thought there existed or intended to inaugurate a mirror-image equality between

intended to be affected by enactment of the McFadden and Glass-Steagall Acts. Accordingly, the *Walker Bank* opinion concluded its legislative analysis as follows:

> It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" *insofar as branch banking was concerned.*" 385 U.S. at 261 (emphasis added)

The clear limitations inherent in the *Walker Bank* holding comport perfectly with the earlier suggestion in *Franklin National Bank* v. *New York, supra,* that Congress customarily employs express references to state law when it wishes to tie national bank powers to state policy.[15]

The implications for the national banking system of the Court of Appeals' vast extension of this Court's decision in *Walker Bank* are profound. It is of great importance that the long standing relationship between federal and state law in this area be considered by this Court and restored to its former balance.

3. Conflicts With Other Circuits

The opinion of the Court below is directly in conflict with decisions of the United States Court of Appeals for the District of Columbia and for the Third Circuit

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the two systems. Indeed, Congress has specifically imposed numerous limitations on national banks which are far stricter than state laws in the same areas. In Florida, for instance, state banks have significantly greater freedom with respect, *inter alia*, to lending limits, legal reserves, election of directors and pledging assets.

[15] At 347 U.S. 378, n. 7 the court listed four instances in which such express language appears in the National Bank Act.

and with earlier decisions of the Fifth Circuit Court itself.

In *Camden Trust Company* v. *Gidney,* 301 F.2d 521 (1962), cert. den. 369 U.S. 886 (1962) the District of Columbia Circuit considered a challenge to the granting of a new national bank charter by the Comptroller of the Currency. Plaintiff's contention was that the proposed new bank would "for all practical purposes constitute a branch facility" of another bank which had been instrumental in its formation. As a branch, the new facility would admittedly have been precluded from operating at its proposed location.

The Court of Appeals noted first that the section of the National Bank Act (12 U.S.C. 36) dealing with branching "is clear on its face and says, without ambiguity, exactly what it means." And that "(b)eyond peradventure, Congress even defined the term 'branch' ", 301 F.2d at 524.[16] The Court then decided that the new bank was clearly not a branch. Having decided that the activity in question was not a branch within the meaning of the 12 U.S.C. 36(f) definition the Court concluded that 12 U.S.C. 36 had "no applicability to the situation disclosed on the record" and that it was unnecessary to consider the effect of state law, which would become operative only to the extent that it was subsumed by 12 U.S.C. 36.[17]

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[16] The Court of Appeals here, on the other hand, finds that 12 U.S.C. 36(f) "is hardly adequate as a definition." (App. A, p. 17a)

[17] In *Whitney National Bank* v. *Bank of New Orleans & Trust Co.,* 323 F. 2d 290 (1963), rev'd. on other grounds, 379 U.S. 411. The District of Columbia Circuit approached 12 U.S.C. 36 in the same frame of reference. The Court in *Whitney,* unlike *Camden* found on the facts that the activity in question was a branch. But

The opinion of the District of Columbia Circuit in *Camden Trust* is precisely in accord with the decision of the District Court which was reversed by the Court of Appeals in the case at bar. The District Judge below was satisfied that deposits were not received, checks paid or money lent by First National's messenger. Accordingly, he found that 12 U.S.C. 36(c) had no applicability and there was no basis for looking to state law as a possible bar to the national bank activity in question. In reversing the District Court, the Court of Appeals created a direct conflict with the District of Columbia Circuit. In rejecting what it characterized as the *Camden Trust* court's "desire to adhere to federal law" (App. A., p. 9a) the opinion below specifically draws attention to this conflict.

In addition to the direct conflict with the D. C. Circuit, the opinion of Judge Goldberg in this case is in apparent conflict with earlier decisions of the Fifth Circuit itself. In *State of Texas* v. *National Bank of Commerce of San Antonio,* 290 F.2d 229 (1961) the same court refused to bring up state law branching restrictions through sec. 36(c) and apply them to an activity of a national bank which was authorized by other provisions of the National Bank Act. The Court reached this result even though the activity in question actually involved one or more of the branching functions enumerated at sec. 36(f).

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in so doing, the test applied was the sec. 36(f) definition through which, the Court noted, Congress had given "meaning to the word branch" (323 F. 2d at 301). A recent District Court case which treats sec. 36(f) as a definition of the term "branch" and ignores state law in assessing the nature of the off-premises facility involved is *Metropolitan National Bank of Farmington* v. *Camp,* 281 F. Supp. 238 (E.D. Mich. 1968).

In *Jackson* v. *First National Bank of Valdosta*, 349 F.2d 71, 72 (1965) the Fifth Circuit decided to apply state law to a proposed drive-in facility only after determining that it met the sec. 36(f) definition. Correctly reading sections 36(c) and 36(f) together the Court in *Jackson* stated the law as follows:

> Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office.

The Court of Appeals' opinion is additionally in error and, again, in conflict with other circuits in holding that the Florida Banking Commissioner's interpretation constitutes the kind of state law which may be incorporated into sec. 36(c), (assuming, as the Court of Appeals did, but as the District Court and petitioner deny, that section 36 is applicable here). In a related error the Court abdicated its own responsibility to construe the state law in such circumstances, by conditioning its decision on the outcome of a pending state court suit.

12 U.S.C. 36(c) refers to the "statute law of the state" and not to administrative interpretations of that law. Other courts have regularly held that regulations or interpretations of State Banking Commissioners are not to be considered in determining what the statute law of the state permits or prohibits with respect to national bank branches. *Union Savings Bank of Patchogue* v. *Saxon*, 335 F.2d 718, 723, (D.C. Cir. 1964); *State* v. *National Bank of South Dakota*, 219 F. Supp. 842, 848-851 (D.S.D. 1963); aff'd. 335

F.2d 444 (8th Cir. 1964); *Leuthold* v. *Camp,* 273 F. Supp. 695 (D. Mont. 1967).

The opinion of the Court of Appeals is directly in conflict with the decision of the Third Circuit in *Howell* v. *Citizens First National Bank of Ridgewood,* 385 F.2d 528 (1967). In the *Howell* case the Court reversed the District Court's order staying the federal proceedings pending determination by a state court as to the proper application of state branching law to the case at hand. The Third Circuit held that the meaning of the New Jersey branch banking statute was "a purely federal question" for purposes of 12 U.S.C. 36(c) and that "abstention in favor of the state courts is not appropriate." 385 F.2d at 531. The decision of the Court of Appeals in this case is precisely contrary to the *Howell* case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. EDWARDS
Attorney for Petitioner

Of Counsel:

ALSTON, MILLER & GAINES

November 25, 1968

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the attached petition with appendices to V. Carroll Webb, the Capitol, Tallahassee, Florida, attorney for Fred O. Dickinson, Jr., to William Reece Smith, Jr., Post Office Box 3239, Tampa, Florida 33601, attorney for the Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland and to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 with sufficient postage attached.

This 25th day of November, 1968.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25173

FRED O. DICKINSON, JR., Comptroller
of the State of Florida, ET AL, *Appellants,*

versus

THE FIRST NATIONAL BANK IN PLANT CITY,
PLANT CITY, FLORIDA, ET AL, *Appellees.*

Appeal from the United States District Court for the Northern District of Florida

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(September 12, 1968)

Before TUTTLE and GOLDBERG, Circuit Judges, and HOOPER, District Judge.

GOLDBERG, Circuit Judge: This case involves a meshing process in our federalism as we observe two sovereigns competing for their legitimate spheres. The Comptroller of the State of Florida, supported by intervening state banks, contends that First National's shopping center receptacle and armored car messenger service constitute "branch banking" in violation of Section 659.06 (1) (a) of

the Florida Statutes[1] and that the authority for engaging in such activities is therefore denied by the specific terms of Section 36 (c) (1) of the National Banking Act, 12 U.S.C. 36 (c) (1).[2] First National, supported by the Comptroller of the Currency of the United States as intervenor, contends that its activities do not constitute "branching" as defined in Section 36(f) of the National Banking Act[3] and therefore are not within the coverage of Section 36(c) or Florida Section 659.06. The district court granted judg-

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[1] 659.06 Place of transacting business; school savings; drive-in facilities

(1)(a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

• • •

[2] § 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

• • •

(c) A national banking association may, with the approval of the Comptroller of Currency, establish and operate new branches: (1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;

• • •

[3] § 36(f): "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

ment for First National, stating explicitly: "Florida statute 659.06(1)(a) is not operative or controlling in this instance." We conclude that in this instance Florida law is operative and controlling and reverse.

For the purpose of the disposition of this case on appeal and in view of our reversal in favor of the state comptroller, we adopt the statement of facts as presented by the United States Comptroller. The armored car service and off-premises receptacle at issue in this litigation were established in 1966. In August, 1965, First National inquired of the Comptroller of the Currency about the Comptroller's position on a national bank operating an armored car messenger service. The bank received a reply observing that such a service could properly be provided if the conditions established by the Comptroller's ruling in paragraph 7490 of the Comptroller's Manual were satisfied. Paragraph 7490 provides:

> To meet the requirements of its customers, a Nation Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

The bank subsequently inquired of the Comptroller of the Currency whether the bank could establish a receptacle at a shopping center for the receipt of night bags containing money and checks, which would be recovered daily from the receptacle by the messenger and taken to the bank for deposit. The Comptroller's regional counsel advised:

> A National Bank, as an incident to its banking business, may construct off of its premises a receptacle for

the receipt of night bags containing cash and checks. The receptacle should contain thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice may also advise that adequate insurance coverage will be provided and proper security measures taken. Such a service would not constitute branch banking as defined in 12 U.S.C. 36(f).

Relying on these letters, First National in September, 1966, began operating an armored car service and an off-premises receptacle. These services were established according to the procedures described below.

The armored car messenger service was provided to call at a customer's place of business to pick up cash and checks for the purpose of transporting them to First National's banking house, where they would be deposited to the customer's account. The customers who used the service all had an account with the bank. Prior to using the service they signed a "Comprehensive Dual Control Contract" which provided that First National's messenger transported the monies to the banking house as the agent of the customer. When a customer sent funds to the bank, he accompanied them with a transmittal slip on which he itemized them. The transmittal slip contained a "Contract" which provided that the bank was acting as the agent of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house." Both the transmittal slip and the Comprehensive Dual Control Contract provided that the bank was maintaining hazard insurance for the protection of the principal.

The messenger service was also used to transport cash to those customers who had signed the Comprehensive Dual

Control Contract. The Contract provided that in this situation, also, the bank's messenger would be acting as the agent of the customer. Sums transported to the customer by this method were accompanied by a charge slip indicating that the customer's account had been charged for the amount of the order. A common use of this service was the delivery of coins to be used as change by businesses.

The messenger service operated daily, six days a week. The armored car was owned by the bank, and operated by employees of the bank. The bank also purchased the insurance coverage for the operation. Customers were not charged for the service.

In a shopping center located one mile from its banking house, First National leased an area where it provided a secured receptacle for persons maintaining an account with the bank. The bank's customers who signed the "Comprehensive Dual Control Contract" were issued a key so that they could place night bags containing cash and checks in the receptacle. Additionally, other customers with an account at the bank could use the receptacle by placing their funds in the receptacle in an envelope containing the money and a transmittal slip. The envelopes and transmittal slips were provided at the receptacle. The envelopes stated that the funds transported were accepted in accordance with the contract printed on the transmittal slip, which was the same transmittal slip used with the armored car messenger service. In bold letters at the receptacle a sign stated:

> The messenger who will recover the funds in this receptacle twice daily is acting as the agent for the customer. The funds will not be deemed a deposit until delivered to the bank's premises at 302 W. Haines Street. Insurance coverage for the protection of the funds is provided by the First National Bank in Plant City.

The armored car transported the funds placed in the receptacle to the banking house.

Shortly after First National had placed the two services into operation, the State Comptroller advised the bank that its armored car and shopping center receptacle activities violated Florida law and requested the bank to cease and desist from these operations. First National then brought this action for declaratory relief and an injunction against the State Comptroller, contending its activities were authorized by paramount federal law and thus could not be interfered with by the state authorities. The defendant state banks intervened on the side of the State Comptroller, and the federal Comptroller intervened as a plaintiff.

The district court, by a decision of May 6, 1967, awarded partial summary judgment in favor of First National and the federal Comptroller. The court ruled, as a matter of federal law, that the definition of "branch" in 12 U.S.C. § 36(f) was exclusive, and that under that definition there was no "branch" involved here; thus the state law, incorporated into federal law by 12 U.S.C. § 36(c), did not apply.

On June 2, 1967, the district court issued its final judgment, declaring that the messenger service and off-premises receptacle as authorized by the federal Comptroller were not branches within the meaning of 12 U.S.C. § 36 (and the related provision, 12 U.S.C. § 81) and did not violate Florida law. The court limited the judgment to declaratory relief and did not issue an injunction (due to the state Comptroller's stipulation of intent to abide by the district court's order without further injunctive relief).[4]

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[4] The above statement of facts is found at pp. 2-8 of the United States Comptroller's appellate brief. Contestations of these facts concern the extent of First National's continuous compliance with the above procedures relating to contract and agency. We do not find such disputes relevant in light of our decision.

The controlling issue of law in this appeal concerns the district court's choice of law, i.e., that court's failure to consult state law in determining whether First National's activities outside its main offices constitute "branch banking." Our answer to that issue will require an excursion into statutory history and case and statutory analysis.

Justice Clark, in *First National Bank of Logan, Utah* v. *Walker Bank & Trust Company*, 1966, 385 U.S. 252, 87 S.Ct. 492, 17 L. Ed. 2d 343, capsulates the early history of our national banking system, which was born in anguish and stunted in its early growth. Competition between state and federal banking systems was bound to breed conflicts, and until 1927 federal banks were handicapped considerably by the lack of statutory authority to establish branches, even in states which allowed branch banking. See *First National Bank in St. Louis* v. *Missouri*, 1924, 263 U.S. 640, 44 S.Ct. 213, 68 L. Ed. 486.[5] In 1927 Congress passed what became known as the McFadden Act, which sought to relieve federal-state abrasions through statutory complementarianess. The McFadden Act permitted national banks to establish branches inside the municipality of the main bank, provided that the state in which the

[5] Although the actual holding in that case was the application of a state anti-branching statute applicable to a national bank within that state, the Court at one point in its opinion did deny the existence of any national bank's authority to establish a branch. 263 U.S. at 656-58. Moreover, later in the opinion the Court commented:

> "[N]ational banking associations have gone on for more than half a century without branches, and upon the theory of an absence of authority to establish them. If the nonexistence of such branches, or the absence of power to create them, has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as Federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission." 263 U.S. at 659.

bank was located allowed branch banking. Extended in 1933 to grant certain additional branching powers, the 1927 Act forms the basis of the present Section 36(c) of the National Banking Act.

In the *Walker Bank* case, supra, Justice Clark, after concluding his historical analysis of the National Banking Act, returned to consideration of the present statute with the following words:

> "It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of *'competitive equality'* insofar as branch banking was concerned." 385 U.S. at 261 [Emphasis added.]

The United States Comptroller in *Walker Bank* had argued to the Supreme Court that if state law allows *any type* of branching, the prohibitions in Section 36(c) are not applicable and, therefore, national banks may establish branches in violation of specific state regulations. Justice Clark's analysis demonstrates the Court's overwhelming acceptance of the philosophy of "competitive equality":

> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that the State laws permit branch banking.' Utah clearly permits it 'only to the etxent' that the proposed branch takes over an existing bank.

"The Comptroller also contends that the Act supersedes state law only as to 'whether' and 'where' branches may be located and not the 'method' by which this is effected.

"We believe that where a State allows branching only by taking over an existing bank, it expresses as much 'whether' and 'where' a branch may be located as does a prohibition or a limitation to the home office municipality. *As to the restriction being a 'method,' we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of § 36(c)(1) and (2), regardless of the tag placed upon it.*" 385 U.S. at 261-62. [Emphasis added.]

The philosophy of "competitive equality" clearly had been dominant in the minds of the 1927 and 1933 legislators; however, before *Walker Bank,* courts had sometimes subordinated it to the desire to adhere to federal law. See *First National Bank of Smithfield* v. *Saxon,* 4 Cir. 1965, 352 F.2d 267, 271-72 (which the Supreme Court in *Walker Bank* expressly found to be in conflict with the decisions which it was affirming); *Camden Trust Co.* v. *Gidney,* D.C. Cir. 1962, 301 F.2d 521, cert. den., 369 U.S. 886, 82 S.Ct. 1158, 8 L. Ed. 2d 287 (in which the Court refused to classify a "new" bank as a branch, and in doing so completely ignored the contention by the State of New Jersey, in an amicus brief, that permission for such operation would not be granted to a state bank); *Whitney National Bank* v. *Bank of New Orleans and Trust Co.,* D.C. Cir. 1963, 323 F.2d 290, reversed on other grounds, 1965, 379 U.S. 411, 85 S.Ct. 551, 13 L. Ed. 2d 386 (in which the Court classified a "new" bank as a branch, but did so without reference to state law); *Jackson* v. *First National Bank of Valdosta,* M.D. Ga. 1965, 246 F. Supp. 134, 138 (in which the Court stated specifically: "This court is convinced that in construing the definition of 'branch' found

in 12 U.S.C.A. § 36(f) it should be guided by federal considerations.").[6]

Following the above authority, First National attempts to convince us that Section 33(f) of the National Banking Act is still the sole and monolithic definer of "branch." Then, by taking us through some labyrinthian and meandering paths of the laws of agency and contract, First National seeks to demonstrate that it has not established offices or agencies, where, as specified in Section 36(f), "deposits are received, or checks paid, or money lent." Such a line of argument, even before *Walker Bank*, would not have been acceptable in our Circuit. Now it is indefensible.

In 1965 our Court held that courts must not look to Section 36(f) as their sole guiding light but must permit rays of state law to refract and reflect their statutory vision. In *Jackson* v. *National Bank of Valdosta*, 5 Cir.

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[6] A persuasive argument against complete "competitive equality" as to branch banking can be found in Comment, "Federalism in Interpretation of Branch Banking Legislation," 32 *U. Chi. L. Rev.* 148 (1964). The author in this pre-*Walker Bank* Comment urges that federal courts adopt federal definitions of the term "branch" based essentially on the economical realities of banking. Although well-reasoned and well-documented, the Comment fails in its attempt to justify its position in regard to the National Banking Act, and specifically Section 36(c). Compare Note, 64 *Mich. L. Rev.* 155 (1965) which espouses the philosophy of "competitive equality." See also Comment, "Branch Banking: The Current Controversy," 16 *Stanford L. Rev.* 983 (1964), which pictures the relatively recent re-emergence of this issue into the political arena. In Comment, "Present Banking Structure in Florida and Branch Banking," 20 *Florida L. Rev.* 84, 98-101 (1967), the authors relate the *Walker Bank* decision to current Florida law and even mention the opinion of the district court in the case at bar.

1965, 349 F.2d 71,[7] we quoted Section 36(c) and Section 36(f) and then concluded:

> "Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office. In this way, Congress sought to insure equality between state and national banks regarding the establishment of branches." 349 F.2d at 72.

After quoting the applicable state statute, we continued.

> "Therefore a state bank, located at Valdosta, already having one office or facility in that city, could not open another office or facility there. Consequently, First National likewise could not, under § 36(c), open such a facility." 349 F.2d at 73.

Finally, in discussing the application of Section 36(c), we espoused what was later to be adopted by the Supreme Court as the policy of "competitive equality":

> "That statute [Section 36(c)] is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and South Dakota, supra [*South Dakota* v. *National Bank of South Dakota,* D.S.D. 1963, 219 F. Supp. 842] at 846, that Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and

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[7] Our opinion in *Jackson* preceded the district court's published opinion on remand, cited *supra.* As is evident from our excerpts from the two opinions, the distinguished district judge at that time espoused a different view as to the priorities of branch banking legislation than that expressed in the opinion by our Court.

distinct *'policy of equalization'* for our dual banking system." 349 F.2d at 74. [Emphasis added.]

Our opinion in *Jackson* was relied on extensively in *State Chartered Banks in Washington* v. *Peoples National Bank of Washington,* W.D. Wash. 1966, No. 6338 (unpublished memorandum decision), a case in which the exact legal issue at bar was squarely before the court. Unfortunately Judge Lindberg's scholarly analysis, which was written before the *Walker Bank* decision, was never published. We therefore quote from it liberally:

> "The issue on the merits is whether the proposed drive-in facility is an illegal branch of a national bank under the provisions of 12 U.S.C. § 36. The conditions upon which a national banking association may establish and operate a branch, as set forth in section 36, in effect incorporate state laws. These state laws relate to the establishment and operation of branches as authorized to state banks. Therefore, in construing federal law, the court must also construe the pertinent banking laws of the State of Washington." p. 15.
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> • • • •
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> "The scope of the term 'branch' is set forth in section 36(f). That section states the term 'branch' shall be 'held to include any branch bank, branch office • • • additional office • • • at which deposits are received or checks paid, or money lent.' Some writers have considered this section as defining the word 'branch.' Judge Holtzoff referred to this subsection as a definition [in *Michigan National Bank* v. *Saxon,* D.C. 1962, Civil No. 82162 (unpublished opinion)] and so did Judge Bootle [in *Jackson* v. *First National Bank of Valdosta, supra*]. It is with much respect and deference that I venture to disagree with their characterization. I feel that the section should not be given the prestige of a definition if it does not meet the standards of a definition. Congress has nearly two hundred

years of experience in enacting statutory definitions. If that body had wished to formulate a true definition I do not believe that the term defined would have appeared as both the subject and the predicate of the definition. Further, the opening paragraph of section 36 clearly indicates that the section was not intended to provide any definitions as such. It states:

> 'The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:'

Subsection (c) [sic] of Section 36 may be a partial definition or a description of what *may be* included within the term 'branch.' It was not intended to be exhaustive. It provides only a broad, functional measuring gauge of what a branch may be. As I read it, the words 'additional office * * * at which deposits are received, or checks paid, or money lent,' provide only a partial, functional definition for determining *prima facie* if the supplementing state branching law should come into play. This is what I feel is the import of the Court of Appeals' decision in *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71.

In the *Valdosta* case the state superintendent of banking, by issuing regulations, chose to expand somewhat this partial definition of 'branch.' The regulations provided that if the drive-in teller facilities were within the boundaries of a single contiguous area, or were across the street but connected by a tunnel or overhead passage, it would not be considered as a branch; it would instead be considered as an expansion of the existing facility. Therefore, when looking at a new national bank facility in Georgia the Comptroller is *required* (by the *Georgia* law) to consider contiguity and physical connection; these may determine the character of the facility. This decision makes it fairly clear that once the facility passes the broad

functional test set forth in section 36(f) the state law takes over and may further define 'branch' in such a way as to comport with the state's banking policy. This was precisely the purpose Congress had in mind when it passed the McFadden Act. See *Walker Bank & Trust Company* v. *Saxon*, supra [the case which was later affirmed by the Supreme Court]. The *Walker* case also emphasized the role of state law in branching by saying, 'We believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it.' Id. p. 94. But see *First National Bank of Smithfield* v. *Saxon*, 352 F.2d 267, 271 (4 Cir. 1965) [see our mention of this case, *supra*, and its treatment by the Supreme Court in the *Walker Bank* decision].

The test of 'branchness' in this situation is therefore twofold — (1) Does the facility fit the broad functional definition laid down by Congress in Section 36 (f), and if so, (2) Does the state law add many more refinements to the definition?

Although defendant argues that Peoples Bank fails to meet the requirements of section 36(f), it admits (or rather does not contest) the fact that the proposed facility will receive deposits and pay checks. However, the defendant asserts that 'only a part' — 25% — of the check-cashing process will be carried out at the proposed facility. They claim that the physical acceptance of the check and payment of the money to the payee constitute only about 25% of the operations connected with check cashing. The remaining operations, such as entry on the books and transmittal of the instrument to the drawee bank, make up the other 75% of the check-cashing process. That may well be. However, the check is nevertheless cashed within the meaning of section 36(f) when the instrument is accepted from and the money paid to the holder. The remaining operations are done so that the transaction

is reflected on the books of the bank and to insure that the cashing bank is repaid by the drawee bank.

When the bank accepts the instrument and pays the holder the check is 'cashed,'—*all* cashed, not 25%, or 50%, but 100% cashed. True, the remaining operations are part of the *check-cashing process,* but the act of check-cashing is complete after receipt of the check and payment of the money; and it is the *act* of check-cashing that is contemplated by section 36(f). The reason for making this distinction is because the defendant in argument attempted to equate the act of check-cashing with the process of check-cashing. They are not identical. This effort at blurring the differences was apparently done for the purpose of showing 'oneness' between the new facility and the principal office at 222 Williams Street. However, 'branchness' is a combination of function and physicality—not bookkeeping. See *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134 (D. Ga. 1965). And any effort to inject the 'unity of operation' test into this case is merely another attempt to avoid confrontation with state law. This test was rejected by the district court in *Bank of Valdosta* and under banking laws more liberal than those in the State of Washington.

Having discussed functional characteristics under the federal statute, we now turn to the physical aspect. *Prima facie,* can the proposed facility be properly termed an 'additional office?' If it can, we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character. This proposed facility is some 260 feet or more from the principal office, on a separate lot, in another block, across a busy thoroughfare, has a different address, and is in a completely disconnected building. No stretching of the term 'additional office' is required at all to see it fits perfectly. The pro-

posed facility is therefore a 'branch' within the meaning of the federal statute (12 U.S.C. § 36(f)).

From this point forward, the state statutes and their interpretation as applied to state banks and their branches become the controlling law in determining whether this facility is to be considered a branch or not. This has been plainly stated as noted earlier in this opinion in *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71, and *Walker Bank & Trust Company* v. *Saxon, supra.* The rest of the inquiry is therefore confined to ascertaining what category this facility falls into if it were being constructed solely under the dominion of state law." pp. 21-25.

* * *

"It is a branch.

It is a branch and it would seem that the Comptroller would have found it to be a branch if he had measured this proposal by the state law of Washington. But he did not. He ignored it, as the Deputy Comptroller stated in his testimony on the stand. In deciding upon the character of this structure the Comptroller did not even consider state law. His apparently deliberate non-observance of the state law was arbitrary, not in accordance with the law, not in accordance with the procedure required by the law, and unwarranted by the facts. See *Bank of Valdosta,* 349 F.2d 71." pp. 28-29.

The above analysis by Judge Lindberg represents an accurate and perceptive application of our statement of policy in *Jackson,* and we subscribe to it without hesitation. We do so on two important grounds. First, we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language. Second, we will not choose to overlook state law in penumbral areas when the thrust of the National Banking Act is

"competitive equality" between national and state branching authority.

Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36(f) Congress provided only that the term "branch" "shall be held to include" these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the life-blood functions of banking. If we construed Section 36(f) as permitting paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths. We repeat the words of Judge Gewin, speaking for our Court en banc, in *Miller* v. *Amusement Enterprises Inc.*, 5 Cir. 1968, 394 F.2d 342, 353:

> "We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment. Our system does not favor mechanical jurisprudence; it seeks to find the purpose and spirit of a statute and the intention of its makers. Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L. Ed. 226, 228; National Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612, 87 S.Ct. 1250, 18 L. Ed. 2d 357, 364."

See also *Lawson* v. *Suwanee Fruit & Steamship Co.*, 1949, 336 U.S. 198, 200-201, 69 S.Ct. 503, 93 L. Ed. 611, 614-15, applying the above principles to statutory definitions.

Having concluded that Congress did not seek to devitalize Section 36(f) with enternally static concepts, we likewise conclude that flexibility is to be accorded not by any federal common law of branching, but rather by recourse to state law. To hold otherwise would violate the specific

teachings of *Jackson* and *Peoples National Bank* and would severely challenge the policy of "competitive equality" which the Supreme Court has so recently established. It would allow the United States Comptroller, by means of oracular definitions, to distort what states believed was banking into non-banking. To be sure, national banks may well fear the authority of state comptrollers to make extreme use of this same defining process, but their recourse must be to Congress which legislated "competitive equality," not to the courts who must follow it.

Although there are acerbities and exacerbations natural to our dual banking system, Congress has sought to provide competitive access to the marts of banking. The Congressional enactments do not assure economic equilibrium, but they do assure a measure of equality of economic opportunity. We therefore refuse to tread the twisting paths of agency and contracts urged upon us in this case and look instead to the laws of Florida.

Section 659.01(1)(a) of the Florida Statutes, note 1 *supra*, is quite broad in stating that a bank "shall have only one place of doing business." As yet, no court opinion has considered the applicability of this statute to receptacle and armored car services, although a similar action is now pending in a Florida state court. *Dickinson* v. *The Tallahassee Bank and Trust Co.*, 2d Jud. Cir., Leon County No. 68-30.[8] The Comptroller of the State of Florida, however, in his letter to the First National dated September 28, 1966, specifically ruled that "these two activities are in violation of Section 659.06(1)(a), Florida Statutes." Such a ruling may sometimes constitute the only "law" of the state, cf. *United States* v. *Howard*, 1957, 352 U.S. 212, 77 S.Ct. 303, 1 L. Ed. 2d 261, and we should follow it when, as here, it appears consistent with the policy of the state

[8] On January 18, 1968, the state court approved a request for a form of abstention-in-reverse and reset the final hearing in its case until after our Court had interpreted the Florida statute in the case at bar.

statute. See *Jackson* v. *First National Bank of Valdosta, supra,* 349 F.2d at 73.[9]

The Florida statute permits only one place of business, and this direction is uncomplicated, unhedged, and unmodified. "Doing business" in Florida can be minimal. Cf. *Phillips* v. *Hooper Chemical Corp.,* 5 Cir. 1967, 375 F.2d 189. Unless we were to cast away all concepts of the functional "business" of a bank, we would have to conclude that First National was "doing business" with its extra services.

As is indicated by the pending litigation, our opinion will probably not be the final interpretation of Florida law as it relates to the activities in question. On remand, therefore, the district court should enter a conditional decree in order that the judgment in this particular controversy is not deemed res judicata in the event of a conflicting statutory interpretation by the Florida state courts. Such remedy was clearly provided for in *Burton* v. *State Farm Mutual Automobile Ins. Co.,* 5 Cir. 1964, 335 F.2d 317, 324, where Judge Brown stated:

> "[W]here things depend on the outcome of litigation elsewhere, or future developments as to controlling substantive or procedural law, the Federal Court has the power — and the duty where appropriate — to enter a conditional order or decree."

The district court should retain jurisdiction, and if Florida law is ultimately determined to be different than here expounded, the court can re-lense its optical view of First National's activities as they relate to Section 36(c) of the National Banking Act.

REVERSED and REMANDED for entry of a judgment in accordance with this opinion.

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[9] Compare *Leuthold* v. *Camp,* D. Mont. 1967, 273 F. Supp. 695, 699 (at [11]), where that court found that the Montana Attorney General's ruling was inconsistent with the applicable state statutes.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for entry of a judgment in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, The First National Bank in Plant City, Plant City, Florida, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 12, 1968

Issued as Mandate:

Memorandum Decision, Filed on May 6, 1967
[R. 704-715]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Tallahassee Civil Action No. 1216

THE FIRST NATIONAL BANK IN PLANT CITY,
Plant City, Florida, *Plaintiff*,

and

WILLIAM B. CAMP, Comptroller of the Currency of the United States, *Plaintiff-Invervenor*,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida; Ex Officio Commissioner of Banking, *Defendant*,

and

THE HILLSBORO BANK; FIRST RUSKIN BANK; and PEOPLES BANK OF LAKELAND, *Defendant-Intervenors*.

MEMORANDUM DECISION

This action was initiated by the First National Bank in Plant City against the Comptroller of the State of Florida in his additional capacity as Commissioner of Banking. The complaint alleged that the State Comptroller had advised the bank that its armored car messenger service for pick up and delivery of cash and other items was a violation of Section 659.06(1)(a) Florida Statutes F.S.A. which provides that "the business of a bank" shall be transacted only at its banking house. The bank asked the Court to declare that its messenger service was not in violation of Section 659.06(1)(a); to enjoin the State Comptroller from "interfering with the lawful operations of Plaintiff"; and

for various judgments declaring the relationship of state and federal banking officials and banking laws.

In his answer to the complaint the defendant referred to section 659.06(1)(a) of the Florida Statutes F.S.A. and to the provisions of the National Bank Act contained at 12 U.S.C. §§ 36 and 81 in support of his position that the bank's activities were unlawful.

Shortly after the federal court proceedings were initiated the State Comptroller filed suit in a state court alleging violation of 659.06(1)(a).

On October 20, 1966 this Court issued its Orders staying proceedings in the State Court and temporarily restraining the State Comptroller from interfering with the plaintiff herein in its conduct of armored car and receptacle services.

Subsequently, three state banks were given leave to intervene permissively as defendants, Brinks, Inc. and the Independent Bankers Associations of Florida and of the United States were permitted to participate as amici curiae and the United States Comptroller of the Currency was granted leave to intervene as a plaintiff.

Both plaintiffs have now moved for summary judgment, memoranda of law with respect thereto have been filed and considered and the Court has heard argument on the motions in open court. By order of the Court, the two issues of the State Comptroller's authority to regulate national banks and of whether the messenger and receptacle services in question constitute an incidental power which can be properly exercised by a national bank pursuant to 12 U.S.C. § 24 (seventh), although raised by the motions for summary judgment, have been deferred for whatever further consideration may be appropriate.

The record before the Court indicates that the United States Comptroller of the Currency has published in his

Manual for National Banks, Ruling 7490[1] which authorized, with various conditions, the provision by national banks of an armored car messenger service to pick up and deliver monies and other items from and to their customers.

On the basis of the Comptroller's ruling and of various communications from the Comptroller's Office, First National Bank in Plant City, in September of 1966 inaugurated a service whereby an armored car owned by the bank and operated by its employee would pick up cash, checks or other items from customers of the bank for deposit to their accounts at the bank. In addition the messenger would deliver cash to customers upon their request. Furthermore, the bank caused a concrete receptacle to be constructed in a shopping center into which items could be placed for pick up by the bank's messenger.

The Comptroller's ruling requires that an agreement be entered into by the bank and its customer using the messenger service providing that the "messenger is the agent of the customer rather than the bank." The record[2] shows that the practice prescribed by the bank and normally followed by its customers was for the customer sending money for deposit to fill out and attach to the items

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[1] 7490. MESSENGER SERVICE

To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

[2] By the Court's order plaintiff produced the names of 10 percent of its customers for deposition by defendants. Conclusions in this decision with respect to the bank's operations are based on those depositions and on the affidavits submitted by all parties.

given the messenger or placed in the receptacle a "Messenger Transmittal" which included the following language:

> First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

Furthermore, most of those sending money for deposit and all customers to whom cash was delivered had signed a "Comprehensive Dual Control Contract" which provided that

> As agent for the undersigned depository, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

When money was delivered to customers it was accompanied by a slip which stated

> Your account has been charged for the TOTAL shown herein representing monies requisitioned for delivery to you by bank's messenger.

The concrete receptacle bore a legend stating in similar terms that monies placed therein would not be deemed deposited until received at the bank's main banking premises.

On these facts, the defendant argued that the messenger and receptacle services, as authorized by the federal Comptroller and conducted by the First National Bank, constitute

branch banking in violation of 12 U.S.C. § 36(c)[3] which generally forbids national banks to branch in those states in which branching is forbidden to State chartered banks. In addition, defendants urged that the services in question involve doing the "general banking business" away from the main premises of the bank in violation of 12 U.S.C. § 81.[4]

While acknowledging that the branching section of the National Bank Act contains, at 12 U.S.C. § 36(f), a description of the term branch:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent;

defendants deny that this section constitutes an exclusive definition and suggest that state law must be considered, as well, in defining a national bank branch. Further, defendants contend that even if one of the three functions enumerated in 12 U.S.C. § 36(f), that is, receiving deposits, paying checks, or making loans must be present, before a

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[3] 12 U.S.C. § 36(c) provides in pertinent part:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (* * *) (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication of recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

[4] § 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

particular activity may be properly deemed branching, nevertheless the activities in question here involved both receiving deposits and paying checks away from the banking house.

It is argued that no real agency relationship exists between the customer and the messenger in that the bank owns the armored truck, pays the messenger and insures the monies while they are in transit.

Furthermore, defendants contend, facts in the record indicate that from time to time variations from the general procedures occur, such as the failure to use the transmittal slip. These variations, it is argued, disrupt whatever agency relationship may normally exist.

Finally defendants urge that the principle of "competitive equality" governs the relations between National and State banks and that, as Florida state banks may not operate armored car services national banks should not be permitted to do so.

Plaintiffs, on the other hand, take the position that 12 U.S.C. § 36(f) is plainly a definition of the term branch as it applies to a national bank, and argue that unless one of the three functions there described is present the operation is not a branch.

A deposit relationship is one of contract, plaintiffs argue, and the bank and its customers contract, by means of the various forms which accompany cash and other items passing back and forth, that the deposit does not take place until the funds are received by a teller at the bank's premises and the deposit ends by means of the charge to the customer's account prior to delivery by the messenger.

Plaintiffs further contend that the agency agreement is an additional contractual arrangement to make abundantly clear that, as the monies are being transported by someone acting in the capacity of agent for the customer, they are not legally in the possession of the bank until they

reach the bank's premises or after they have been subsequently withdrawn from the bank for redelivery.

As to the Section 81 question the Federal Comptroller and the national bank take the position that this section requires only that the "general business" of a national bank be transacted at its main office and that judicial and administrative interpretation through the years have made it clear that substantial activities, including particularly agency operations, may be conducted away from the main banking house.

Each of the above positions, plaintiffs say, are subscribed to by the Federal Reserve Board[5] and the Federal Deposit Insurance Corporation with respect to the banks under their jurisdiction for various purposes.

Finally plaintiffs urge that the question of competitive equality between the two banking systems comes into play only with respect to the authority to establish branches. If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks.

The issues presented by these motions are complex but the Court is persuaded, after consideration of the briefs and argument and the facts in the record, that the armored car and receptacle services authorized by the Comptroller and customarily and ordinarily operated by First National Bank in Plant City do not constitute branching or the "general banking business," in violation of 12 U.S.C. §§ 36 or 81 and that Florida statute 659.06(1)(a), F.S.A. is not operative or controlling in this instance.[6]

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[5] The Board's ruling on the subject is published at 12 C.F.R. 208.110.

[6] Defendants' counterclaims also refer to Florida statute 659.52 F.S.A. No explanation as to this allegation has been offered. Furthermore, that section, which deals with banking business by unauthorized *persons*, appears on its face to be inapplicable to the situation presented in this case.

[1] The definition of branch contained at 12 U.S.C. § 36(f) must be deemed to be the exclusive definition with respect to national banks. *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134 (D.C. Ga. 1965).

[2] To argue that deposits are received or checks paid away from the banking premises is to ignore the plain effect of the deposit and agency contracts entered into by the bank and its customers. "The relation of depositor and banker arises only out of contract, express or implied" 9 C.J.S. Banks and Banking § 267, p. 545. See also *McCrory Stores Corporation* v. *Tunnicliffe,* 104 Fla. 683, 140 So. 806 (1932).

Defendants' reliance on the elements of control and employment to show that the messenger is in reality the agent of the bank is misplaced. Such factors cannot alter the import of an unambiguous contract between the parties. What is evidentially created here is a dual agency in which the messenger acts as agent for the customer for certain purposes and for the bank in other respects.

[3] The record indicates that the off-premises receptacle is used as a storage place for cash and other items until they are picked up by the messenger, and arrangement analogous to night-depositories found at most banks. It is well settled that the placement of funds in such depositories does not create a depositor-depositee relationship but rather one of bailor-bailee. *Bernstein* v. *Northwestern National Bank,* 157 Pa. Super. 73, 41 A2d 440; 10 Am. Jur. 2d § 358.

[4] Once it is established that the activities in question here do not constitute branching, it is not difficult to conclude that they are not "the general banking business" off premises in violation of 12 U.S.C. § 81. The United States Supreme Court has held that

> • • • The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and im-

> portant—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. *Merchants' Nat. Bank* v. *State Nat. Bank,* 10 Wall. 604, 74 U.S. 604, 650, 651, 19 L. Ed. 1008 (1870).

And in 1911, the Attorney General of the United States, in considering whether national banks had power to establish branches, said.

> These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.
>
> That such a distinction does exist in fact is obvious.
>
> An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution. 29 Ops. Atty. Gen. 81 (1911).

[5] While not venturing any detailed observations on the question of competitive equality between the national and state banking systems it is clear that once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching. And defendants, in their pleadings, have not alleged the violation of Florida law in any other respect.

At the hearing on these motions defendants objected to the entry of summary judgment on the ground that a substantial dispute existed with respect to the manner in which First National Bank and its customers were actually implementing the arrangements discussed earlier in this

Memorandum Decision. For this reason, it was argued, the matter should be set for trial so that complete evidence could be developed with respect to variations from the facts already established.

[6] In declaring judgment on the issues involved in this partial summary judgment the Court passes only on the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect. The fact that in particular instances a customer or one of the bank's employees may have deviated from the authorized and established procedures does not detract from their lawfulness. The record affirmatively shows that the bank has actually carried out its declared intent in the execution of the specific operation to a substantial degree. This is enough to entitle it to a judicial determination of legal efficacy in this declaratory decree action.

This Court does not intend to consider every transaction which has taken place since the messenger service was inaugurated in search of the occasion when the wrong transmittal slip was used or a customer delivered money to the messenger without a clear understanding that his deposit would not take place until the money reached the bank.

For instance, facts are before the Court with respect to an arrangement whereby the bank delivers change to its customers as part of a transaction in which cash or a check in the amount of the change delivered is presented to the messenger for deposit to a special change account not otherwise sufficiently funded. The Court is of the opinion that, at least insofar as such change is delivered in exchange for checks, this practice may amount to cashing checks off the bank's premises and to that extent is not approved by this Court. This may well require a showing of actual accounts being debited at the bank in advance of the service.

However, the Court is convinced from the record before it that the Comptroller's ruling is not in conflict with 12

U.S.C. § 36 or 81 and that at least substantial compliance with that ruling is manifest in the record here.

The Court concludes that there is no genuine issue of material fact and that plaintiffs are entitled to partial summary judgment as a matter of law in accordance with Rule 56, Federal Rules of Civil Procedure.

Accordingly, order to this effect will be entered.

DATED this 6th day of May 1967.

G. HARROLD CARSWELL
G. Harrold Carswell
United States District Judge

Order Filed on May 6, 1967 [R. 715-716]

ORDER

This matter having come on for hearing on the motions of plaintiff and plaintiff-intervenor for summary judgment and the Court having considered the memoranda of law submitted and the argument of the parties in open court, and the Court having determined, in accordance with Rule 56, Federal Rules of Civil Procedure, that there is no genuine issue of material fact and that plaintiff and plaintiff-intervenor are entitled to judgment as a matter of law with respect to their allegations that the messenger service and receptacle operations authorized by the United States Comptroller of the Currency and customarily conducted by the First National Bank in Plant City are not violative of 12 U.S.C. 36 and 12 U.S.C. 81, it is hereby

ORDERED, ADJUDGED and DECREED:

(1) That the motions of the plaintiff and plaintiff-intervenor for summary judgment with respect to the issues raised concerning the application of 12 U.S.C. 36 (sic) and 12 U.S.C. 81, be and the same hereby are GRANTED.

(2) That the remaining issues raised by the motions for summary judgment, that is, the validity of the defense interposed by intervenor-defendants with respect to the application of 12 U.S.C. 24 (seventh) to the services referred to in Paragraph 1 above and the authority of the State Comptroller to intervene in the affairs of national banks will be carried forward for further hearing and consideration by this Court, and will be made the subject matter of another and separate order.

DONE and ORDERED this 6th day of May, 1967.

G. Harrold Carswell
G. HARROLD CARSWELL
United States District Judge

Final Judgment, Filed on June 2, 1967 [R. 716-719]

FINAL JUDGMENT

By its order of May 6, 1967, this Court granted partial summary judgment for plaintiffs for the reasons and to the extent set forth in that order and the accompanying memorandum decision. That order further stated that the question of the incidental powers of national banks pursuant to 12 U.S.C. 24 (seventh) would be the subject of a future order. The Court has now concluded that in view of the Court's disposition of the other issues raised a decision as to the effect of 12 U.S.C. 24 (seventh) is not appropriate or necessary, the Court declines to rule on that issue. Accordingly, the motion to strike that defense filed by plaintiff is moot. Therefore, the Court now enters final judgments as follows:

ORDERED, ADJUDGED and DECREED that

1. The First National Bank in Plant City was duly authorized by the Comptroller of the Currency of the United States to conduct armored car messenger and off-premises

receptacle services consistent with the Comptroller's ruling 7490.

2. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not branches within the meaning of 12 U.S.C. 36 or in contravention of Section 659.06(1)(a) Florida Statutes.

3. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City do not violate 12 U.S.C. 81.

4. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not in violation of or in conflict with Florida law.

5. Although plaintiff First National Bank in Plant City is entitled to a decree permanently enjoining Fred O. Dickinson, Jr., Comptroller of the State of Florida from interfering with the bank's operation of its armored car messenger and off-premises receptacle services, the defendant State Comptroller has stipulated in open court his intention to abide this Court's order without necessity for further injunctive relief, permanent injunction will therefore be withheld.

It is further ORDERED, ADJUDGED and DECREED that the Court's order of May 6, 1967, granting partial summary judgment and the accompanying memorandum decision are hereby incorporated in full into this Final Judgment.

In view of the Court's disposition of this case as ordered above, it is further ORDERED, ADJUDGED and DECREED that to the extent not heretofore granted or denied, intervening defendants' motions to produce, and motions to strike be and the same hereby are denied, and that plaintiff-intervenors' objections to interrogatories and motion for protective order be and the same hereby are sustained.

It is further ORDERED, ADJUDGED and DECREED that the temporary injunction entered against the defendant State Comptroller pending final determination in this action is dissolved and that the plaintiff First National Bank in Plant City and Home Indemnity Company, as its bondsman, be and the same hereby are discharged from any liability under the bond in the amount of $2,500 previously required by this Court's order,

It is further ORDERED, ADJUDGED and DECREED that the Court's Order Staying Proceedings in Case No. 155831 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida pending final disposition of this matter, be and the same hereby is rescinded and set aside upon assurance by counsel for the defendant Comptroller that motion to dismiss will be filed promptly in that cause of action previously enjoined.

It is further ORDERED, ADJUDGED and DECREED that all counter claims filed by defendant and intervening defendants be and the same hereby are dismissed with prejudice and final judgment is hereby entered for plaintiffs and against defendant and intervening defendants.

DONE and ORDERED in Chambers at Tallahassee this 2nd day of June 1967.

G. Harrold Carswell
G. HARROLD CARSWELL
United States District Judge

APPENDIX B

Title 12, United States Code §§ 36(c), 36(f) and 81

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the City, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishement and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Florida Statutes § 659.06

659.06 *Place of transacting business; school savings; drive-in facilities*

(1)(a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said com-

munity specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the commissioner may require.

Paragraph 7490, The Comptroller's Manual for National Banks

"To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer."

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12 U.S.C. 36(e)	7, 56
12 U.S.C. 36(f)	2, 3, 4, 5, 6, 7, 9, 10, 13, 15, 56
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12 U.S.C. 36(h)	7, 57
12 U.S.C. 84	11
12 U.S.C. 92a	11
12 U.S.C. 321	14
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12 U.S.C. 1813(o)	15
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
PETITIONER,

v.

FRED O. DICKINSON, JR., COMPTROLLER
OF THE STATE OF FLORIDA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Solicitor General, on behalf of the Comptroller of the Currency of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 16-36)[1] is reported at 400 F. 2d 548. The opinion of the district court (App. B, *infra*, pp. 37-47) is reported at 274 F. Supp. 449.

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[1] "App." refers to the Appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1968 (App. A, *infra*, p. 36). By order of December 9, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including January 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, for purposes of the reference in 12 U.S.C. 36(c) to state law as controlling the permissibility of a national bank "branch", the statutory scheme, including the definition of "branch" in 12 U.S.C. 36(f), permits state rules also to control the threshold determination of what banking activities constitute a "branch".

STATUTES INVOLVED

12 U.S.C. 36, formerly Section 7 of the McFadden Act of 1927, 44 Stat. 1228-1229, as amended, is set forth in Appendix C, *infra*, pp. 53-57. The original text of Section 7 of the McFadden Act of 1927 is also set forth in Appendix C, *infra*, pp. 58-59. Section 659.06(1)(a) of the Florida Statutes is set forth in Appendix C, *infra*, p. 60.

STATEMENT

1. Section 36 of Title 12 of the United States Code establishes the conditions under which national banks may establish and operate new "branches". They may do so where state law would authorize a state bank to establish and operate such a branch. 12 U.S.C. 36(c). But this and the other conditions apply only to activities of national banks which constitute "branching".

And 12 U.S.C. 36(f) specifies that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received or checks paid, or money lent."

2. In 1966, the First National Bank in Plant City (Florida)[2] began the operation of an armored car messenger service to and from its office and established an off-premises secured receptacle from which the messenger could pick up items left by customers. The messenger service transports cash and checks from First National's customers to the banking house, where the funds are deposited to the customers' accounts (App. A, p. 19), and also transports from the banking house to the customers cash that has been charged against their accounts (App. A, pp. 19-20). The secured receptacle is located in a shopping center one mile from the banking house, and is available for use by persons maintaining accounts with the bank (App. A, pp. 20-21).[3]

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[2] First National has separately petitioned for a writ of certiorari in this case (No. 777, this Term).

[3] The armored car messenger service and off-premises receptacle are provided in such a manner as to comply (App. B, pp. 39-41, 50) with Paragraph 7490 of the Manual for National Banks of the Comptroller of the Currency of the United States, which provides:

> To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

3. The bank had obtained approval for this new service from the Comptroller of the Currency of the United States (petitioner herein and hereafter "United States Comptroller"). Shortly after First National inaugurated the service, however, the respondent, Fred O. Dickinson, Jr., Comptroller of the State of Florida (hereafter "Florida Comptroller"),[4] wrote First National that he considered the armored car service and off-premises receptacle in violation of the Florida law prohibiting branch banking, and warned it to cease-and-desist (App. A, p. 21).

First National then brought this action against the Florida Comptroller, seeking declaratory and injunctive relief. The United States Comptroller intervened on the side of First National, while several state banks intervened to support the Florida Comptroller. The district court (App. B, pp. 41-47) determined that provision of these services was in general authorized under the federal banking laws and that state law was no bar. The court ruled that federal law determines what constitutes a branch for purposes of Section 36 (c), that the definition of "branch" in 12 U.S.C. 36(f) is exclusive, and that, on the facts of this case, there was no "branching" and thus no occasion to refer to state law. (App. B, pp. 43-46, 50).

The court of appeals reversed (App. A, pp. 16-36). That court ruled it unnecessary to examine whether the use of the armored car service and off-premises receptacle constituted receiving deposits, paying checks, or lending money away from the main office of the bank, which are the touchstones of the federal definition of

[4] The Florida Comptroller is *ex officio* the State banking commissioner.

"branch" in 12 U.S.C. 36 (f). Subsection (f), the court stated, is "hardly adequate" to determine what is a "branch" (App. A, p. 32). Instead, in the belief that "radiations" from this Court's decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, make State norms pervasive, the court held that the state's definition of the scope of "branching" would be "operative and controlling" (App. A, p. 17). Since the pertinent state statute (Fla. Stat. 659.06(1)(a), App. C, *infra*, p. 60) was unclear and had not yet been interpreted by a state court, the court of appeals accepted the Florida Comptroller's cease-and-desist letter as dispositive, without further analysis than to note that the letter's conclusion "appears consistent with the policy of the state statute" (App. A, p. 34).[5]

REASONS FOR GRANTING THE WRIT

The decision below, that state banking authorities may in effect determine the lawfulness of off-premises services provided by national banks, raises an important question of federal banking law that has not been, but should be, considered by this Court. The holding that state law determines the scope of the term "branch" in 12 U.S.C. 36 is inconsistent with the language and legislative history of the statute and conflicts with the approach taken by other courts of appeals. If

[5] In light, however, of litigation pending in the Florida courts on the interpretation of the Florida statute (*Dickinson* v. *The Tallahassee Bank and Trust Co.*, 2d Jud. Cir., Leon County No. 68-30), the court observed that the Florida Comptroller's views would perhaps not be the "final" interpretation of the Florida law. Accordingly, the case was ordered remanded to the district court for entry of a decree in the Florida Comptroller's favor, but without prejudice to reconsideration if "Florida law is ultimately determined to be different than here expounded." (App. A, p. 35).

it stands, the decision below will significantly impede the functioning of national banks by shifting control over a large segment of their activities, not heretofore considered "branching", to the state banking authorities.

1. The development of the national banking system and the determination of the powers and functions of national banks have involved many carefully considered congressional judgments. Section 36, which originated as Section 7 of the McFadden Act of 1927, sets forth the conditions under which national banks "may retain or establish and operate a branch or branches". And subsection (f) specifically provides, "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent." This definition of the scope of Section 36 is relevant not only to the incorporation of state law under Section 36(c) with respect to the establishment of new branches. It governs also matters as to which state law has no pertinence at all: the retention of "branches" in operation at the time of enactment of the McFadden Act [Section 36(a)];[6] the minimum aggregate capital requirements for all "branches" [Section 36(d)]; the requirement that the United States Comptroller alone consent to a national bank's change

[6] Branches authorized under subsection (a) need not even be in the national bank's home state. Thus, under this subsection (a), the Bank of California, a national bank whose main office is in San Francisco, operates branches in Oregon and Washington, and the First Camden National Bank and Trust Company, Camden, New Jersey, operates a branch in Philadelphia, Pennsylvania.

in the location of a "branch [Section 36(e)]; and the establishment of "branches" in dependencies, insular possessions and foreign countries [Section 36(g)].

Thus, the structure of Section 36 as a whole renders anomalous any suggestion that a court should look elsewhere than to subsection (f) to determine what is a "branch" for purposes of any of the other subsections. And the error in referring to state law for definition is made even more clear by an examination of the text and legislative history of the original 1927 Act (App. C, *infra,* pp. 58-59). In Section 7 of the McFadden Act Congress specifically referred to state law when it wished it to apply (see subsections (e) and (h)). Had Congress intended to incorporate state law to enlarge the definition of "branch", it thus knew well enough how to express such an intent. Instead, subsection (f) sets out independent federal standards as to what constitutes a "branch". Indeed, Representative McFadden made it clear at the time of enactment that Congress itself did intend to fix the definition. Speaking of subsection (f), he stated that it

> *defines the term "branch."* Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting business carried on at the main office, is a branch * * * [Emphasis added]. [68 Cong. Rec. 5816 (1927)].[7]

The court of appeals dismissed subsection (f) as

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[7] Similarly, H. Rep. No. 583, 68th Cong., 1st Sess. (1924), p. 3, observes, "*The term 'branch' or 'branches' is defined* so as to include any form of office established outside of the bank for the purpose of receiving deposits, cashing checks, or making loans." (Emphasis added).

"hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the life-blood functions of banking." (App. A, p 32). The premise is sound, but the conclusion erroneous. Rather, the congressional decision to define "branch" in traditional terms manifested an intention that the coverage of all of the conditions specified in Section 36 should be uniform, and not subject to the vagaries of the laws of the several states. Certainly, Congress did not intend that the application of the purely federal conditions in Section 36 should vary from state to state, and it would be anomalous to give "branch" in subsection (c) a meaning different from that in the other subsections.

Thus, the court of appeals' reading of Section 36(c) seriously distorts the meaning of this vital section of the national bank legislation. It ignores the well settled principle that, unless Congress clearly intended otherwise, words in a federal statute—"[i]ntended to be nation-wide in its application"—are to be given a federal meaning, *even where* Congress has not provided for any explicit definition. *New York* v. *Feiring,* 313 U.S. 283, 285; *American Surety Co.* v. *Bethlehem National Bank,* 314 U.S. 314, 316.[8] This rule is especially pertinent where national banks are involved:

> "National Banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress

[8] See, also, *Federal Deposit Insurance Corp.* v. *Tremaine,* 133 F. 2d 827, 828-829 (C.A. 2).

> and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit." * * *

Mercantile Nat. Bank v. *Langdeau,* 371 U.S. 555, 558-559, quoting *Van Reed* v. *People's Nat. Bank,* 198 U.S. 554, 557. Because national banks are "federal instrumentalities" their activities are generally immune from state restrictions except as Congress may expressly provide to the contrary. See *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.

2. The Fifth Circuit's decision conflicts with the approach taken by at least two other courts of appeals. See *Camden Trust Co.* v. *Gidney,* 301 F. 2d 521 (C.A.D.C.), certiorari denied, 369 U.S. 886; *First National Bank in Billings* v. *First Bank Stock Corp.,* 306 F. 2d 937 (C.A. 9); see also *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.,* 323 F. 2d 290 (C.A.D.C.), reversed on other grounds, 379 U.S. 411. In those cases the issue was whether certain activities by national banks or their directors constituted the establishment of a "branch" for purposes of 12 U.S.C. 36. In *Camden Trust,* the court expressly held that there was no branching even though the dissenting judge pointed out that state law was to the contrary: "Beyond peradventure, Congress * * * defined the term 'branch.'" 301 F. 2d at 524.[9] The Ninth Circuit similarly resolved the question without reference to state law notions.

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[9] Accord, *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134, 138 (M.D. Ga.); Comment, 32 U. Chi. L. Rev. 148 (1964).

In *Jackson* v. *First National Bank of Valdosta,* 349 F. 2d 71, the Fifth Circuit had apparently recognized that, at the very least 12 U.S.C. 36(f) sets outer federal-law limits on the scope

The court below recognized this conflict, and conceded that no other reported decision since the McFadden Act was passed in 1927 had given the states the power to determine what off-premises activities may be restricted as "branching." But it considered that the question was controlled by this Court's intervening decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252. (App. A, pp. 24-25.) Surely, this is an improper interpretation.

The *Walker Bank* case in no way indicates that the definition of "branch" in 12 U.S.C. 36(f) is rendered superfluous by state law concepts. In *Walker Bank,* all parties assumed, quite soundly, that the new offices involved constituted "branches" and thus that Section 36(c) was applicable. The only question before the Court was whether, under Section 36(c), state law controls not only whether and where national banks may establish "branches" but also by what method. In that context, this Court stated that "Congress intended to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" 385 U.S. at 261 (emphasis added). But nothing in the policy relied on by this Court for equality of opportunity in establishing new "branches" warrants the jump made by the court below in holding that Congress has remitted to the states the threshold question of defining the class of activities as to which there is to

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of 12 U.S.C. 36(c). After discussing the interaction of the two subsections, the court concluded (349 F. 2d at 72): "* * * a national banking association is precluded from opening any office *at which deposits are received, checks paid, or money lent* unless a similarly situated state bank would be authorized under state law to open a similar office." (Emphasis added.) That is, unless "deposits are received, checks paid, or money lent," there can be no "branch" under federal law.

be "competitive equality." This Court should now make it clear that "competitive equality" is not a talisman that empowers the states to restrict whatever, for their purposes, they may call branching.[10]

3. The decision below opens the way to serious state limitation of the off-premises services that can be offered by national banks. The court's theory that state law determines the definition of "branch" will permit a state to define any off-premises activity as branching, and, by so doing, confine the service activities of national banks to the banks' four walls if the state so chooses.

Before the enactment of the McFadden Act, national banks did not have the power to establish "branches". *First National Bank* v. *Missouri,* 263 U.S. 640. But they did have the power to conduct other off-premises activities. As this Court long ago recognized, the "business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person,

[10] Except in the limited areas where Congress has specifically incorporated state law into the federal banking laws, as in 12 U.S.C. 36(c) (or, *e.g.,* 12 U.S.C. 92a), any goal of "competitive equality" is chimerical. Inherent in two *different* systems of banking are relative advantages and disadvantages for each. For example, under Section 659.16 of the Florida Statutes, state banks may maintain their legal reserves in interest-bearing obligations of the United States or in obligations guaranteed by the United States, whereas national banks, under 12 U.S.C. 461 *et seq.* and 12 C.F.R. 204, must maintain their reserves in the form of non-income producing deposits at the Federal Reserve Bank. Similarly, under Section 659.17 of the Florida Statutes a state bank may lend to a single customer up to 10% of capital and surplus, unsecured, and up to 25% of capital and surplus on a secured transaction, whereas a national bank, under 12 U.S.C. 84, is limited to 10% of capital and surplus regardless of security. National banks, as this Court has only recently reiterated, are immune from state sales and use taxes on tangible personal property. *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.

or by correspondents or other agents." *Merchants' Bank* v. *State Bank,* 10 Wall. 604, 651. Similarly aware of the practicalities of the banking business, this Court, in *First National Bank* v. *Missouri, supra,* 263 U.S. at 658, specifically agreed with a 1911 opinion of the Attorney General which had concluded that there is "a wide difference" between "the right to establish branch banks at which a general banking business is carried on" and "the appointment of agents to receive and collect money and forward it to the bank." 29 Ops. Atty. Gen. 81, 90.

Included among the off-premises, non-"branch" services performed by national banks even before the McFadden Act was the operation of armored car messenger services, the very activity involved here.[11] In addition, national banks today conduct a multitude of off-premises activities, including new-business solicitation, loan closings, sale of money orders and travellers' checks, banking by mail, credit card services, various correspondent services, and data processing. Some banks even maintain their trust departments in separate buildings from the main bank. It is inconceivable that, without expressly so providing, Congress could have intended that the lawfulness of all of these functions turn on state definitions of "branch".

The court of appeals conceded that under its theory, "national banks may well fear the authority of state comptrollers to make extreme use of * * * this * * * defining process". (App. A, pp. 33-34).[11a] Such novel and

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[11] 71 Bankers' Magazine 1017 (1906); 81 Bankers' Magazine 739 (1910); 83 Bankers' Magazine 350b, 732, 805 (1911); 84 Bankers' Magazine 746 (1912).

[11a] The Georgia banking commissioner, for example, has quite recently ruled illegal certain loan-production activities of a na-

disruptive results, however, are not compelled by the terms of 12 U.S.C. 36(c) and (f). They are contrary to the general policy of the federal banking laws to have a system of national banks serving as active, not passive, competitors, *Franklin National Bank* v. *New York*, 347 U.S. 373, 377, and shielded, except where expressly provided to the contrary, from the "hazard of unfriendly legislation by the States," *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 413; see also *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339. While the court below suggested that it was deferring to state law only in "penumbral" areas (App. A, p. 32), the only possible line to demarcate the edge of the "penumbra" is between on-premises and off-premises banking activity. Any off-premises banking activity would appear to be within the penumbra and thus within the court's holding.

The danger posed by the court of appeals' view of the role of state law is seriously aggravated by its acceptance—in the absence of any pertinent state court decision—of the Florida Comptroller's letter as an authoritative interpretation of an unclear state statute. (App. A, pp. 34-35). This approach is contrary to that taken in *Howell* v. *Citizens First National Bank of Ridgewood*, 385 F. 2d 528 (C.A. 3), and *Union Savings Bank of Patchogue* v. *Saxon*, 335 F. 2d 718, 723 (C.A.D.C).[12] It is especially unjustified in view of the

tional bank, explaining to the bank: "As you probably know, the Fifth Circuit Court of Appeals has ruled that the National Bank Act requires that national banks conform to state banking authorities' definitions of branch banking." American Banker, January 3, 1969, p. 1, col. 2, p. 13, col. 3.

[12] Compare *Commissioner of Internal Revenue* v. *Estate of Bosch*, 387 U.S. 456, 465. See also, *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153, 160-162; *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F. 2d 832, 851 (C.A. 2).

fact that in many states (not including Florida) the state banking departments, either by law or custom, are controlled by persons from or associated with state banks.[13]

Another result of the view taken by the court below would be that—despite the fact that 12 U.S.C. 36(c) provides only for approval by the United States Comptroller as a prerequisite to establishment of a national bank branch—the United States Comptroller would not be able to give authoritative advice as to whether an existing or proposed off-premises activity is a "branch". The exclusively federal administrative system would be complicated by the necessity that national banks obtain rulings from state banking authorities in order to be sure that an existing or proposed activity is legal. Contra, *Attorney General ex rel. State Banking Commissioner* v. *Michigan National Bank*, 298 Mich. 417, 437, 299 N.W. 129, 136. And, indeed, the federal authority would be unable to determine whether or not an activity is one for which its approval is required under the statute until it knew whether the state authorities considered it a "branch." The effect would be unacceptable disruption of the administration of the federal banking laws.[14]

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[13] The United States Comptroller advises us that in 14 states the state banking commissioners are former state bankers, while in only four states are the commissioners former national bankers. Perhaps more significantly, of the 30 states having state banking boards, in at least 21 of those states either by law or custom a majority of the members of the boards are composed of state bankers. In eight states, this majority is required by law.

[14] The decision below may also significantly alter the administration of the federal banking laws with respect to *state* banks. The provisions of 12 U.S.C. 321 pertaining to the conditions on which state member banks of the Federal Reserve System may establish

CONCLUSION

Because the court below has erroneously decided an important federal question, this petition for a writ of certiorari should be granted.[15]

Respectfully submitted.

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January 1969.

"branches" are keyed to the conditions imposed on national banks under 12 U.S.C. 36. Likewise, since 12 U.S.C. 1813(o) defines "branch" in terms virtually identical with 12 U.S.C. 36, control by the Federal Deposit Insurance Corporation through 12 U.S.C. 1828(d) over branching by state nonmember insured banks would undoubtedly be modified by the court of appeals' decision. While the exact impact of the court's decision in these areas is not clear, it is plain that these other federal banking authorities would have to re-examine their own authority in light of the Fifth Circuit's decision.

[15] If this Court should decide that federal law does determine the definition of "branch" in 12 U.S.C. 36(f), the question is then presented as to whether First National's armored car service and off-premises receptacle constitute "branches" within the meaning of the statute. We submit that the district court's finding that First National's activities do not constitute "branching" is well-supported.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 25173

FRED O. DICKINSON, JR., Comptroller of the State of Florida, ET AL, *Appellants,*

VERSUS

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, ET AL, *Appellees.*

Appeal from the United States District Court for the Northern District of Florida

(September 12, 1968)

Before TUTTLE and GOLDBERG, Circuit Judges, and HOOPER, District Judge.

GOLDBERG, Circuit Judge: This case involves a meshing process in our federalism as we observe two sovereigns competing for their legitimate spheres. The Comptroller of the State of Florida, supported by intervening state banks, contends that First National's shopping center receptacle and armored car messenger service constitute "branch banking" in violation of Section 659.06 (1) (a) of the Florida Statutes[1] and

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[1] 659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such

that the authority for engaging in such activities is therefore denied by the specific terms of Section 36 (c) (1) of the National Banking Act, 12 U.S.C. 36 (c) (1).[2] First National, supported by the Comptroller of the Currency of the United States as intervenor, contends that its activities do not constitute "branching" as defined in Section 36(f) of the National Banking Act[3] and therefore are not within the coverage of Section 36(c) or Florida Section 659.06. The district court granted judgment for First National, stating explicitly: "Florida statute 659.06(1)(a) is not operative or controlling in this instance." We conclude that in this instance Florida law is operative and controlling and reverse.

For the purpose of the disposition of this case on appeal and in view of our reversal in favor of the state comptroller, we adopt the statement of facts as presented by the United States Comptroller. The armored

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approval shall be in such form and contain such information as the Commissioner may require.

* * *

[2] § 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

(c) A national banking association may, with the approval of the Comptroller of Currency, establish and operate new branches:

(1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;

* * *

[3] § 36(f): "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

car service and off-premises receptacle at issue in this litigation were established in 1966. In August, 1965, First National inquired of the Comptroller of the Currency about the Comptroller's position on a national bank operating an armored car messenger service. The bank received a reply observing that such a service could properly be provided if the conditions established by the Comptroller's ruling in paragraph 7490 of the Comptroller's Manual were satisfied. Paragraph 7490 provides:

> To meet the requirements of its customers, a Nation Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

The bank subsequently inquired of the Comptroller of the Currency whether the bank could establish a receptacle at a shopping center for the receipt of night bags containing money and checks, which would be recovered daily from the receptacle by the messenger and taken to the bank for deposit. The Comptroller's regional counsel advised:

> A National Bank, as an incident to its banking business, may construct off of its premises a receptacle for the receipt of night bags containing cash and checks. The receptacle should contain thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent

> for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice may also advise that adequate insurance coverage will be provided and proper security measures taken. Such a service would not constitute branch banking as defined in 12 U.S.C. 36(f).

Relying on these letters, First National in September, 1966, began operating an armored car service and an off-premises receptacle. These services were established according to the procedures described below.

The armored car messenger service was provided to call at a customer's place of business to pick up cash and checks for the purpose of transporting them to First National's banking house, where they would be deposited to the customer's account. The customers who used the service all had an account with the bank. Prior to using the service they signed a "Comprehensive Dual Control Contract" which provided that First National's messenger transported the monies to the banking house as the agent of the customer. When a customer sent funds to the bank, he accompanied them with a transmittal slip on which he itemized them. The transmittal slip contained a "Contract" which provided that the bank was acting as the agent of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house." Both the transmittal slip and the Comprehensive Dual Control Contract provided that the bank was maintaining hazard insurance for the protection of the principal.

The messenger service was also used to transport cash to those customers who had signed the Comprehensive Dual Control Contract. The Contract provided that in this situation, also, the bank's messenger would be

acting as the agent of the customer. Sums transported to the customer by this method were accompanied by a charge slip indicating that the customer's account had been charged for the amount of the order. A common use of this service was the delivery of coins to be used as change by businesses.

The messenger service operated daily, six days a week. The armored car was owned by the bank, and operated by employees of the bank. The bank also purchased the insurance coverage for the operation. Customers were not charged for the service.

In a shopping center located one mile from its banking house, First National leased an area where it provided a secured receptacle for persons maintaining an account with the bank. The bank's customers who signed the "Comprehensive Dual Control Contract" were issued a key so that they could place night bags containing cash and checks in the receptacle. Additionally, other customers with an account at the bank could use the receptacle by placing their funds in the receptacle in an envelope containing the money and a transmittal slip. The envelopes and transmittal slips were provided at the receptacle. The envelopes stated that the funds transported were accepted in accordance with the contract printed on the transmittal slip, which was the same transmittal slip used with the armored car messenger service. In bold letters at the receptacle a sign stated:

> The messenger who will recover the funds in this receptacle twice daily is acting as the agent for the customer. The funds will not be deemed a deposit until delivered to the bank's premises at 302 W. Haines Street. Insurance coverage for the protection of the funds is provided by the First National Bank in Plant City.

The armored car transported the funds placed in the receptacle to the banking house.

Shortly after First National had placed the two services into operation, the State Comptroller advised the bank that its armored car and shopping center receptacle activities violated Florida law and requested the bank to cease and desist from these operations. First National then brought this action for declaratory relief and an injunction against the State Comptroller, contending its activities were authorized by paramount federal law and thus could not be interfered with by the state authorities. The defendant state banks intervened on the side of the State Comptroller, and the federal Comptroller intervened as a plaintiff.

The district court, by a decision of May 6, 1967, awarded partial summary judgment in favor of First National and the federal Comptroller. The court ruled, as a matter of federal law, that the definition of "branch" in 12 U.S.C. § 36(f) was exclusive, and that under that definition there was no "branch" involved here; thus the state law, incorporated into federal law by 12 U.S.C. § 36(c), did not apply.

On June 2, 1967, the district court issued its final judgment, declaring that the messenger service and off-premises receptacle as authorized by the federal Comptroller were not branches within the meaning of 12 U.S.C. § 36 (and the related provision, 12 U.S.C. § 81) and did not violate Florida law. The court limited the judgment to declaratory relief and did not issue an injunction (due to the state Comptroller's stipulation of intent to abide by the district court's order without further injunctive relief).[4]

[4] The above statement of facts is found at pp. 2-8 of the United States Comptroller's appellate brief. Contestations of these facts concern the extent of First National's continuous compliance with the above procedures relating to contract and agency. We do not find such disputes relevant in light of our decision.

The controlling issue of law in this appeal concerns the district court's choice of law, i.e., that court's failure to consult state law in determining whether First National's activities outside its main offices constitute "branch banking." Our answer to that issue will require an excursion into statutory history and case and statutory analysis.

Justice Clark, in *First National Bank of Logan, Utah* v. *Walker Bank & Trust Company,* 1966, 385 U.S. 252, 87 S.Ct. 492, 17 L. Ed. 2d 343, capsulates the early history of our national banking system, which was born in anguish and stunted in its early growth. Competition between state and federal banking systems was bound to breed conflicts, and until 1927 federal banks were handicapped considerably by the lack of statutory authority to establish branches, even in states which allowed branch banking. See *First National Bank in St. Louis* v. *Missouri,* 1924, 263 U.S. 640, 44 S.Ct. 213, 68 L. Ed. 486.[5] In 1927 Congress passed what became known as the McFadden Act, which sought to relieve federal-state abrasions through statutory complementarianess. The McFadden Act permitted national banks to establish branches inside the municipality of the

[5] Although the actual holding in that case was the application of a state anti-branching statute applicable to a national bank within that state, the Court at one point in its opinion did deny the existence of any national bank's authority to establish a branch. 263 U.S. at 656-58. Moreover, later in the opinion the Court commented:

> "[N]ational banking associations have gone on for more than half a century without branches, and upon the theory of an absence of authority to establish them. If the nonexistence of such branches, or the absence of power to create them, has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as Federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken by Congress to remedy the omission." 263 U.S. at 659.

main bank, provided that the state in which the bank was located allowed branch banking. Extended in 1933 to grant certain additional branching powers, the 1927 Act forms the basis of the present Section 36(c) of the National Banking Act.

In the *Walker Bank* case, supra, Justice Clark, after concluding his historical analysis of the National Banking Act, returned to consideration of the present statute with the following words:

> "It appears clear from this resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of *'competitive equality'* insofar as branch banking was concerned." 385 U.S. at 261 [Emphasis added.]

The United States Comptroller in *Walker Bank* had argued to the Supreme Court that if state law allows *any type* of branching, the prohibitions in Section 36(c) are not applicable and, therefore, national banks may establish branches in violation of specific state regulations. Justice Clark's analysis demonstrates the Court's overwhelming acceptance of the philosophy of "competitive equality":

> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the laws of which permit it, and even there 'only to the extent that

> the State laws permit branch banking.' Utah clearly permits it 'only to the extent' that the proposed branch takes over an existing bank.
>
> "The Comptroller also contends that the Act supersedes state law only as to 'whether' and 'where' branches may be located and not the 'method' by which this is effected.
>
> "We believe that where a State allows branching only by taking over an existing bank, it expresses as much 'whether' and 'where' a branch may be located as does a prohibition or a limitation to the home office municipality. *As to the restriction being a 'method,' we have concluded that since it is part and parcel of Utah's policy, it was absorbed by the provisions of § 36(c) (1) and (2), regardless of the tag placed upon it.*" 385 U.S. at 261-62. [Emphasis added.]

The philosophy of "competitive equality" clearly had been dominant in the minds of the 1927 and 1933 legislators; however, before *Walker Bank,* courts had sometimes subordinated it to the desire to adhere to federal law. See *First National Bank of Smithfield* v. *Saxon,* 4 Cir. 1965, 352 F.2d 267, 271-72 (which the Supreme Court in *Walker Bank* expressly found to be in conflict with the decisions which it was affirming); *Camden Trust Co.* v. *Gidney,* D.C. Cir. 1962, 301 F.2d 521, cert. den., 369 U.S. 886, 82 S.Ct. 1158, 8 L. Ed. 2d 287 (in which the Court refused to classify a "new" bank as a branch, and in doing so completely ignored the contention by the State of New Jersey, in an amicus brief, that permission for such operation would not be granted to a state bank); *Whitney National Bank* v. *Bank of New Orleans and Trust Co.,* D.C. Cir. 1963, 323 F.2d 290, reversed on other grounds, 1965, 379 U.S. 411, 85 S.Ct. 551, 13 L. Ed. 2d 386 (in which the Court

classified a "new" bank as a branch, but did so without reference to state law); *Jackson* v. *First National Bank of Valdosta,* M.D. Ga. 1965, 246 F. Supp. 134, 138 (in which the Court stated specifically: "This court is convinced that in construing the definition of 'branch' found in 12 U.S.C.A. § 36(f) it should be guided by federal considerations.").[6]

Following the above authority, First National attempts to convince us that Section 33(f) of the National Banking Act is still the sole and monolithic definer of "branch." Then, by taking us through some labyrinthian and meandering paths of the laws of agency and contract, First National seeks to demonstrate that it has not established offices or agencies, where, as specified in Section 36(f), "deposits are received, or checks paid, or money lent." Such a line of argument, even before *Walker Bank,* would not have been acceptable in our Circuit. Now it is indefensible.

In 1965 our Court held that courts must not look to Section 36(f) as their sole guiding light but must permit rays of state law to refract and reflect their

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[6] A persuasive argument against complete "competitive equality" as to branch banking can be found in Comment, "Federalism in Interpretation of Branch Banking Legislation," 32 *U. Chi. L. Rev.* 148 (1964). The author in this pre-*Walker Bank* Comment urges that federal courts adopt federal definitions of the term "branch" based essentially on the economical realities of banking. Although well-reasoned and well-documented, the Comment fails in its attempt to justify its position in regard to the National Banking Act, and specifically Section 36(c). Compare Note, 64 *Mich. L. Rev.* 155 (1965) which espouses the philosophy of "competitive equality." See also Comment, "Branch Banking: The Current Controversy," 16 *Stanford L. Rev.* 983 (1964), which pictures the relatively recent re-emergence of this issue into the political arena. In Comment, "Present Banking Structure in Florida and Branch Banking," 20 *Florida L. Rev.* 84, 98-101 (1967), the authors relate the *Walker Bank* decision to current Florida law and even mention the opinion of the district court in the case at bar.

statutory vision. In *Jackson* v. *National Bank of Valdosta,* 5 Cir. 1965, 349 F.2d 71,[7] we quoted Section 36(c) and Section 36(f) and then concluded:

> "Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state law to open a similar office. In this way, Congress sought to insure equality between state and national banks regarding the establishment of branches." 349 F.2d at 72.

After quoting the applicable state statute, we continued.

> "Therefore a state bank, located at Valdosta, already having one office or facility in that city, could not open another office or facility there. Consequently, First National likewise could not, under § 36(c), open such a facility." 349 F.2d at 73.

Finally, in discussing the application of Section 36(c), we espoused what was later to be adopted by the Supreme Court as the policy of "competitive equality":

> "That statute [Section 36(c)] is explicit in providing that the substantive law of the state in which each national banking association is located fixes the bounds of such association's branching authority. We agree with the district court in this case and South Dakota, supra [*South Dakota* v. *National Bank of South Dakota,* D.S.D. 1963,

[7] Our opinion in *Jackson* preceded the district court's published opinion on remand, cited *supra.* As is evident from our excerpts from the two opinions, the distinguished district judge at that time espoused a different view as to the priorities of branch banking legislation than that expressed in the opinion by our Court.

> 219 F. Supp. 842] at 846, that Congress did not have to give this effect to state law. But it is highly significant that Congress did give it such effect and that it did so pursuant to a strong and distinct *'policy of equalization'* for our dual banking system." 349 F.2d at 74. [Emphasis added.]

Our opinion in *Jackson* was relied on extensively in *State Chartered Banks in Washington* v. *Peoples National Bank of Washington,* W.D. Wash. 1966, No. 6338 (unpublished memorandum decision), a case in which the exact legal issue at bar was squarely before the court. Unfortunately Judge Lindberg's scholarly analysis, which was written before the *Walker Bank* decision, was never published. We therefore quote from it liberally:

> "The issue on the merits is whether the proposed drive-in facility is an illegal branch of a national bank under the provisions of 12 U.S.C.§ 36. The conditions upon which a national banking association may establish and operate a branch, as set forth in section 36, in effect incorporate state laws. These state laws relate to the establishment and operation of branches authorized to state banks. Therefore, in construing federal law, the court must also construe the pertinent banking laws of the State of Washington." p. 15.
>
> * * * * *
>
> "The scope of the term 'branch' is set forth in section 36(f). That section states the term 'branch' shall be 'held to include any branch bank, branch office * * * additional office * * * at which deposits are received or checks paid, or money lent.' Some writers have considered this section as defining the word 'branch.' Judge Holtzoff referred to this

subsection as a definition [in *Michigan National Bank* v. *Saxon*, D.C. 1962, Civil No. 82162 (unpublished opinion)] and so did Judge Bootle [in *Jackson* v. *First National Bank of Valdosta, supra*]. It is with much respect and deference that I venture to disagree with their characterization. I feel that the section should not be given the prestige of a definition if it does not meet the standards of a definition. Congress has nearly two hundred years of experience in enacting statutory definitions. If that body had wished to formulate a true definition I do not believe that the term defined would have appeared as both the subject and the predicate of the definition. Further, the opening paragraph of section 36 clearly indicates that the section was not intended to provide any definitions as such. It states:

> 'The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:'

Subsection (c) [sic] of Section 36 may be a partial definition or a description of what *may be* included within the term 'branch.' It was not intended to be exhaustive. It provides only a broad, functional measuring gauge of what a branch may be. As I read it, the words 'additional office * * * at which deposits are received, or checks paid, or money lent,' provide only a partial, functional definition for determining *prima facie* if the supplementing state branching law should come into play. This is what I feel is the import of the Court of Appeals' decision in *Jackson* v. *First National Bank of Valdosta*, 349 F.2d 71.

In the *Valdosta* case the state superintendent of banking, by issuing regulations, chose to expand

somewhat this partial definition of 'branch.' The regulations provided that if the drive-in teller facilities were within the boundaries of a single contiguous area, or were across the street but connected by a tunnel or overhead passage, it would not be considered as a branch; it would instead be considered as an expansion of the existing facility. Therefore, when looking at a new national bank facility in Georgia the Comptroller is *required* (by the *Georgia* law) to consider contiguity and physical connection; these may determine the character of the facility. This decision makes it fairly clear that once the facility passes the broad functional test set forth in section 36(f) the state law takes over and may further define 'branch' in such a way as to comport with the state's banking policy. This was precisely the purpose Congress had in mind when it passed the McFadden Act. See *Walker Bank & Trust Company* v. *Saxon,* supra [the case which was later affirmed by the Supreme Court]. The *Walker* case also emphasized the role of state law in branching by saying, 'We believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it.' Id. p. 94. But see *First National Bank of Smithfield* v. *Saxon,* 352 F.2d 267, 271 (4 Cir. 1965) [see our mention of this case, *supra,* and its treatment by the Supreme Court in the *Walker Bank* decision].

The test of 'branchness' in this situation is therefore twofold—(1) Does the facility fit the broad functional definition laid down by Congress in Section 36 (f), and if so, (2) Does the state law add many more refinements to the definition?

Although defendant argues that Peoples Bank fails to meet the requirements of section 36(f), it

admits (or rather does not contest) the fact that the proposed facility will receive deposits and pay checks. However, the defendant asserts that 'only a part'—25%—of the check-cashing process will be carried out at the proposed facility. They claim that the physical acceptance of the check and payment of the money to the payee constitute only about 25% of the operations connected with check cashing. The remaining operations, such as entry on the books and transmittal of the instrument to the drawee bank, make up the other 75% of the check-cashing process. That may well be. However, the check is nevertheless cashed within the meaning of section 36(f) when the instrument is accepted from and the money paid to the holder. The remaining operations are done so that the transaction is reflected on the books of the bank and to insure that the cashing bank is repaid by the drawee bank.

When the bank accepts the instrument and pays the holder the check is 'cashed,'—*all* cashed, not 25%, or 50%, but 100% cashed. True, the remaining operations are part of the *check-cashing process,* but the act of check-cashing is complete after receipt of the check and payment of the money; and it is the *act* of check-cashing that is contemplated by section 36(f). The reason for making this distinction is because the defendant in argument attempted to equate the act of check-cashing with the process of check-cashing. They are not identical. This effort at blurring the differences was apparently done for the purpose of showing 'oneness' between the new facility and the principal office at 222 Williams Street. However, 'branchness' is a combination of function and physicality—not bookkeeping. See *Jackson* v.

First National Bank of Valdosta, 246 F. Supp. 134 (D. Ga. 1965). And any effort to inject the 'unity of operation' test into this case is merely another attempt to avoid confrontation with state law. This test was rejected by the district court in *Bank of Valdosta* and under banking laws more liberal than those in the State of Washington.

Having discussed functional characteristics under the federal statute, we now turn to the physical aspect. *Prima facie,* can the proposed facility be properly termed an 'additional office?' If it can, we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character. This proposed facility is some 260 feet or more from the principal office, on a separate lot, in another block, across a busy thoroughfare, has a different address, and is in a completely disconnected building. No stretching of the term 'additional office' is required at all to see it fits perfectly. The proposed facility is therefore a 'branch' within the meaning of the federal statute (12 U.S.C. § 36(f)).

From this point forward, the state statutes and their interpretation as applied to state banks and their branches become the controlling law in determining whether this facility is to be considered a branch or not. This has been plainly stated as noted earlier in his opinion in *Jackson* v. *First National Bank of Valdosta,* 349 F.2d 71, and *Walker Bank & Trust Company* v. *Saxon, supra.* The rest of the inquiry is therefore confined to ascertaining what category this facility falls into if it were being constructed solely under the dominion of state law." pp. 21-25.

* * * * *

"It is a branch.

It is a branch and it would seem that the Comptroller would have found it to be a branch if he had measured this proposal by the state law of Washington. But he did not. He ignored it, as the Deputy Comptroller stated in his testimony on the stand. In deciding upon the character of this structure the Comptroller did not even consider state law. His apparently deliberate non-observance of the state law was arbitrary, not in accordance with the law, not in accordance with the procedure required by the law, and unwarranted by the facts. See *Bank of Valdosta,* 349 F.2d 71." pp. 28-29.

The above analysis by Judge Lindberg represents an accurate and perceptive application of our statement of policy in *Jackson,* and we subscribe to it without hesitation. We do so on two important grounds. First, we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language. Second, we will not choose to overlook state law in penumbral areas when the thrust of the National Banking Act is "competitive equality" between national and state branching authority.

Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36(f) Congress provided only that the term "branch" "shall be held to include" these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the life-blood functions of banking. If we construed Section 36(f) as permitting

paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths. We repeat the words of Judge Gewin, speaking for our Court en banc, in *Miller* v. *Amusement Enterprises Inc.*, 5 Cir. 1968, 394 F.2d 342, 353:

> "We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment. Our system does not favor mechanical jurisprudence; it seeks to find the purpose and spirit of a statute and the intention of its makers. Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L. Ed. 226, 228; National Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612, 87 S.Ct. 1250, 18 L. Ed. 2d 357, 364."

See also *Lawson* v. *Suwanee Fruit & Steamship Co.*, 1949, 336 U.S. 198, 200-201, 69 S.Ct. 503, 93 L. Ed. 611, 614-15, applying the above principles to statutory definitions.

Having concluded that Congress did not seek to devitalize Section 36(f) with enternally static concepts, we likewise conclude that flexibility is to be accorded not by any federal common law on branching, but rather by recourse to state law. To hold otherwise would violate the specific teachings of *Jackson* and *Peoples National Bank* and would severely challenge the policy of "competitive equality" which the Supreme Court has so recently established. It would allow the United States Comptroller, by means of oracular definitions, to distort what states believed was banking into non-banking. To be sure, national banks may well fear the authority of state comptrollers to

make extreme use of this same defining process, but their recourse must be to Congress which legislated "competitive equality," not to the courts who must follow it.

Although there are acerbities and exacerbations natural to our dual banking system, Congress has sought to provide competitive access to the marts of banking. The Congressional enactments do not assure economic equilibrium, but they do assure a measure of equality of economic opportunity. We therefore refuse to tread the twisting paths of agency and contracts urged upon us in this case and look instead to the laws of Florida.

Section 659.01(1)(a) of the Florida Statutes, note 1 *supra,* is quite broad in stating that a bank "shall have only one place of doing business." As yet, no court opinion has considered the applicability of this statute to receptacle and armored car services, although a similar action is now pending in a Florida state court. *Dickinson* v. *The Tallahassee Bank and Trust Co.,* 2d Jud. Cir., Leon County No. 68-30.[8] The Comptroller of the State of Florida, however, in his letter to the First National dated September 28, 1966, specifically ruled that "these two activities are in violation of Section 659.06(1)(a), Florida Statutes." Such a ruling may sometimes constitute the only "law" of the state, cf. *United States* v. *Howard,* 1957, 352 U.S. 212, 77 S.Ct. 303, 1 L. Ed. 2d 261, and we should follow it when, as here, it appears consistent with the policy of the state statute. See *Jackson* v. *First National Bank of Valdosta, supra,* 349 F.2d at 73.[9]

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[8] On January 18, 1968, the state court approved a request for a form of abstention-in-reverse and reset the final hearing in its case until after our Court had interpreted the Florida statute in the case at bar.

[9] Compare *Leuthold* v. *Camp,* D. Mont. 1967, 273 F. Supp. 695, 699 (at [11]), where that court found that the Montana Attorney General's ruling was inconsistent with the applicable state statutes.

The Florida statute permits only one place of business, and this direction is uncomplicated, unhedged, and unmodified. "Doing business" in Florida can be minimal. Cf. *Phillips* v. *Hooper Chemical Corp.*, 5 Cir. 1967, 375 F.2d 189. Unless we were to cast away all concepts of the functional "business" of a bank, we would have to conclude that First National was "doing business" with its extra services.

As is indicated by the pending litigation, our opinion will probably not be the final interpretation of Florida law as it relates to the activities in question. On remand, therefore, the district court should enter a conditional decree in order that the judgment in this particular controversy is not deemed res judicata in the event of a conflicting statutory interpretation by the Florida state courts. Such remedy was clearly provided for in *Burton* v. *State Farm Mutual Automobile Ins. Co.*, 5 Cir. 1964, 335 F.2d 317, 324, where Judge Brown stated:

> "[W]here things depend on the outcome of litigation elsewhere, or future developments as to controlling substantive or procedural law, the Federal Court has the power—and the duty where appropriate—to enter a conditional order or decree."

The district court should retain jurisdiction, and if Florida law is ultimately determined to be different than here expounded, the court can re-lense its optical view of First National's activities as they relate to Section 36(c) of the National Banking Act.

REVERSED and REMANDED for entry of a judgment in accordance with this opinion.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for entry of a judgment in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, The First National Bank in Plant City, Plant City, Florida, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 12, 1968

Issued as Mandate:

APPENDIX B

MEMORANDUM DECISION, FILED ON MAY 6, 1967
[R. 704-715]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

Tallahassee Civil Action No. 1216

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida, *Plaintiff*,

and

WILLIAM B. CAMP, Comptroller of the Currency of the United States, *Plaintiff-Invervenor*,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida; Ex Officio Commissioner of Banking, *Defendant*,

and

THE HILLSBORO BANK; FIRST RUSKIN BANK; and PEOPLES BANK OF LAKELAND, *Defendant-Intervenors*.

MEMORANDUM DECISION

This action was initiated by the First National Bank in Plant City against the Comptroller of the State of Florida in his additional capacity as Commissioner of Banking. The complaint alleged that the State Comptroller had advised the bank that its armored car messenger service for pick up and delivery of cash and other items was a violation of Section 659.06(1)(a) Florida Statutes F.S.A. which provides that "the business of a bank" shall be transacted only at its banking house. The bank asked the Court to declare that its

messenger service was not in violation of Section 659.06 (1) (a); to enjoin the State Comptroller from "interfering with the lawful operations of Plaintiff"; and for various judgments declaring the relationship of state and federal banking officials and banking laws.

In his answer to the complaint the defendant referred to section 659.06(1)(a) of the Florida Statutes F.S.A. and to the provisions of the National Bank Act contained at 12 U.S.C. §§ 36 and 81 in support of his position that the bank's activities were unlawful.

Shortly after the federal court proceedings were initiated the State Comptroller filed suit in a state court alleging violation of 659.06(1) (a).

On October 20, 1966 this Court issued its Orders staying proceedings in the State Court and temporarily restraining the State Comptroller from interfering with the plaintiff herein in its conduct of armored car and receptacle services.

Subsequently, three state banks were given leave to intervene permissively as defendants, Brinks, Inc. and the Independent Bankers Associations of Florida and of the United States were permitted to participate as amici curiae and the United States Comptroller of the Currency was granted leave to intervene as a plaintiff.

Both plaintiffs have now moved for summary judgment, memoranda of law with respect thereto have been filed and considered and the Court has heard argument on the motions in open court. By order of the Court, the two issues of the State Comptroller's authority to regulate national banks and of whether the messenger and receptacle services in question constitute an incidental power which can be properly exercised by a national bank pursuant to 12 U.S.C. § 24 (seventh), although raised by the motions for summary judgment, have been deferred for whatever further consideration may be appropriate.

The record before the Court indicates that the United States Comptroller of the Currency has published in his Manual for National Banks, Ruling 7490 [1] which authorized, with various conditions, the provision by national banks of an armored car messenger service to pick up and deliver monies and other items from and to their customers.

On the basis of the Comptroller's ruling and of various communications from the Comptroller's Office, First National Bank in Plant City, in September of 1966 inaugurated a service whereby an armored car owned by the bank and operated by its employee would pick up cash, checks or other items from customers of the bank for deposit to their accounts at the bank. In addition the messenger would deliver cash to customers upon their request. Furthermore, the bank caused a concrete receptacle to be constructed in a shopping center into which items could be placed for pick up by the bank's messenger.

The Comptroller's ruling requires that an agreement be entered into by the bank and its customer using the messenger service providing that the "messenger is the agent of the customer rather than the bank." The record [2] shows that the practice prescribed by the bank and

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[1] 7490. MESSENGER SERVICE

To meet the requirements of its customers, a national bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer.

[2] By the Court's order plaintiff produced the names of 10 percent of its customers for deposition by defendants. Conclusions in this decision with respect to the bank's operations are based on those depositions and on the affidavits submitted by all parties.

normally followed by its customers was for the customer sending money for deposit to fill out and attach to the items given the messenger or placed in the receptacle a "Messenger Transmittal" which included the following language:

> First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

Furthermore, most of those sending money for deposit and all customers to whom cash was delivered had signed a "Comprehensive Dual Control Contract" which provided that

> As agent for the undersigned depository, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

When money was delivered to customers it was accompanied by a slip which stated

> Your account has been charged for the TOTAL shown herein representing monies requisitioned for delivery to you by bank's messenger.

The concrete receptacle bore a legend stating in similar terms that monies placed therein would not be

deemed deposited until received at the bank's main banking premises.

On these facts, the defendant argued that the messenger and receptacle services, as authorized by the federal Comptroller and conducted by the First National Bank, constitute branch banking in violation of 12 U.S.C. § 36(c)[3] which generally forbids national banks to branch in those states in which branching is forbidden to State chartered banks. In addition, defendants urged that the services in question involve doing the "general banking business" away from the main premises of the bank in violation of 12 U.S.C. § 81.[4]

While acknowledging that the branching section of the National Bank Act contains, at 12 U.S.C. § 36(f), a description of the term branch:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent;

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[3] 12 U.S.C. § 36(c) provides in pertinent part:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (* * *) (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication of recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

[4] § 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

defendants deny that this section constitutes an exclusive definition and suggest that state law must be considered, as well, in defining a national bank branch. Further, defendants contend that even if one of the three functions enumerated in 12 U.S.C. § 36(f), that is, receiving deposits, paying checks, or making loans must be present, before a particular activity may be properly deemed branching, nevertheless the activities in question here involved both receiving deposits and paying checks away from the banking house.

It is argued that no real agency relationship exists between the customer and the messenger in that bank owns the armored truck, pays the messenger and insures the monies while they are in transit.

Furthermore, defendants contend, facts in the record indicate that from time to time variations from the general procedures occur, such as the failure to use the transmittal slip. These variations, it is argued, disrupt whatever agency relationship may normally exist.

Finally defendants urge that the principle of "competitive equality" governs the relations between National and State banks and that, as Florida state banks may not operate armored car services national banks should not be permitted to do so.

Plaintiffs, on the other hand, take the position that 12 U.S.C. § 36(f) is plainly a definition of the term branch as it applies to a national bank, and argue that unless one of the three functions there described is present the operation is not a branch.

A deposit relationship is one of contract, plaintiffs argue, and the bank and its customers contract, by means of the various forms which accompany cash and other items passing back and forth, that the deposit does not take place until the funds are received by a teller at the bank's premises and the deposit ends by

means of the charge to the customer's account prior to delivery by the messenger.

Plaintiffs further contend that the agency agreement is an additional contractual arrangement to make abundantly clear that, as the monies are being transported by someone acting in the capacity of agent for the customer, they are not legally in the possession of the bank until they reach the bank's premises or after they have been subsequently withdrawn from the bank for redelivery.

As to the Section 81 question the Federal Comptroller and the national bank take the position that this section requires only that the "general business" of a national bank be transacted at its main office and that judicial and administrative interpretation through the years have made it clear that substantial activities, including particularly agency operations, may be conducted away from the main banking house.

Each of the above positions, plaintiffs say, are subscribed to by the Federal Reserve Board[5] and the Federal Deposit Insurance Corporation with respect to the banks under their jurisdiction for various purposes.

Finally plaintiffs urge that the question of competitive equality between the two banking systems comes into play only with respect to the authority to establish branches. If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks.

The issues presented by these motions are complex but the Court is persuaded, after consideration of the briefs and argument and the facts in the record, that the armored car and receptacle services authorized by the Comptroller and customarily and ordinarily oper-

[5] The Board's ruling on the subject is published at 12 C.F.R. 208.110.

ated by First National Bank in Plant City do not constitute branching or the "general banking business," in violation of 12 U.S.C. §§ 36 or 81 and that Florida statute 659.06(1) (a), F.S.A. is not operative or controlling in this instance.[6]

The definition of branch contained at 12 U.S.C. § 36(f) must be deemed to be the exclusive definition with respect to national banks. *Jackson* v. *First National Bank of Valdosta,* 246 F. Supp. 134 (D.C. Ga. 1965).

To argue that deposits are received or checks paid away from the banking premises is to ignore the plain effect of the deposit and agency contracts entered into by the bank and its customers. "The relation of depositor and banker arises only out of contract, express or implied" 9 C.J.S. Banks and Banking § 267, p. 545. See also *McCrory Stores Corporation* v. *Tunnicliffe,* 104 Fla. 683, 140 So. 806 (1932).

Defendants' reliance on the elements of control and employment to show that the messenger is in reality the agent of the bank is misplaced. Such factors cannot alter the import of an unambiguous contract between the parties. What is evidentially created here is a dual agency in which the messenger acts as agent for the customer for certain purposes and for the bank in other respects.

The record indicates that the off-premises receptacle is used as a storage place for cash and other items until they are packed up by the messenger, an arrangement analogous to night-depositories found at most banks. It is well settled that the placement of

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[6] Defendants' counterclaims also refer to Florida statute 659.52 F.S.A. No explanation as to this allegation has been offered. Furthermore, that section, which deals with banking business by unauthorized *persons,* appears on its face to be inapplicable to the situation presented in this case.

funds in such depositories does not create a depositor-depositee relationship but rather one of bailor-bailee. *Bernstein* v. *Northwestern National Bank,* 157 Pa. Super. 73, 41 A2d 440; 10 Am. Jur. 2d § 358.

Once it is established that the activities in question here do not constitute branching, it is not difficult to conclude that they are not "the general banking business" off premises in violation of 12 U.S.C. § 81. The United States Supreme Court has held that

> * * * The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. *Merchants' Nat. Bank* v. *State Nat. Bank,* 10 Wall. 604, 74 U.S. 604, 650, 651, 19 L. Ed. 1008 (1870).

And in 1911, the Attorney General of the United States, in considering whether national banks had power to establish branches, said.

> These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

That such a distinction does exist in fact is obvious.

> An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate or-

> ganization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution. 29 Ops. Atty. Gen. 81 (1911).

While not venturing any detailed observations on the question of competitive equality between the national and state banking systems it is clear that once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching. And defendants, in their pleadings, have not alleged the violation of Florida law in any other respect.

At the hearing on these motions defendants objected to the entry of summary judgment on the ground that substantial dispute existed with respect to the manner in which First National Bank and its customers were actually implementing the arrangements discussed earlier in this Memorandum Decision. For this reason, it was argued, the matter should be set for trial so that complete evidence could be developed with respect to variations from the facts already established.

In declaring judgment on the issues involved in this partial summary judgment the Court passes only on the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect. The fact that in particular instances a customer or one of the bank's employees may have deviated from the authorized and established procedures does not detract from their lawfulness. The record affirmatively shows that the bank has actually carried out its declared intent in the execution of the specific operation to a substantial degree. This is enough to entitle it to a judicial determination of legal efficacy in this declaratory decree action.

This Court does not intend to consider every transaction which has taken place since the messenger service was inaugurated in search of the occasion when the wrong transmittal slip was used or a customer delivered money to the messenger without a clear understanding that his deposit would not take place until the money reached the bank.

For instance, facts are before the Court with respect to an arrangement whereby the bank delivers change to its customers as part of a transaction in which cash or a check in the amount of the change delivered is presented to the messenger for deposit to a special change account not otherwise sufficiently funded. The Court is of the opinion that at least insofar as such change is delivered in exchange for checks, this practice may amount to cashing checks off the bank's premises and to that extent is not approved by this Court. This may well require a showing of actual accounts being debited at the bank in advance of the service.

However, the Court is convinced from the record before it that the Comptroller's ruling is not in conflict with 12 U.S.C. §36 or 81 and that at least substantial compliance with that ruling is manifest in the record here.

The Court concludes that there is no genuine issue of material fact and that plaintiffs are entitled to partial summary judgment as a matter of law in accordance with Rule 56, Federal Rules of Civil Procedure.

Accordingly, order to this effect will be entered.

G. HARROLD CARSWELL
G. Harrold Carswell
United States District Judge

ORDER FILED ON MAY, 6, 1967 [R. 715-716]

ORDER

This matter having come on for hearing on the motions of plaintiff and plaintiff-intervenor for summary judgment and the Court having considered the memoranda of law submitted and the argument of the parties in open court, and the Court having determined, in accordance with Rule 56, Federal Rules of Civil Procedure, that there is no genuine issue of material fact and that plaintiff and plaintiff-intervenor are entitled to judgment as a matter of law with respect to their allegations that the messenger service and receptacle operations authorized by the United States Comptroller of the Currency and customarily conducted by the First National Bank in Plant City are not violative of 12 U.S.C. 36 and 12 U.S.C. 81, it is hereby

ORDERED, ADJUDGED and DECREED:

(1) That the motions of the plaintiff and plaintiff-intervenor for summary judgment with respect to the issues raised concerning the application of 12 U.S.C. 36 (sic) and 12 U.S.C. 81, be and the same hereby are GRANTED.

(2) That the remaining issues raised by the motions for summary judgment, that is, the validity of the defense interposed by intervenor-defendants with respect to the application of 12 U.S.C. 24 (seventh) to the services referred to in Paragraph 1 above and the authority of the State Comptroller to intervene in the affairs of national banks will be carried forward for further hearing and consideration by this Court, will

be made the subject matter of another and separate order.

DONE and ORDERED this 6th day of May, 1967.

G. HARROLD CARSWELL
G. Harrold Carswell
United States District Judge

FINAL JUDGMENT, FILED ON JUNE 2, 1967 [R. 716-719]

FINAL JUDGMENT

By its order of May 6, 1967, this Court granted partial summary judgment for plaintiffs for the reasons and to the extent set forth in that order and the accompanying memorandum decision. That order further stated that the question of the incidental powers of national banks pursuant to 12 U.S.C. 24 (seventh) would be the subject of a future order. The Court has now concluded that in view of the Court's disposition of the other issues raised a decision as to the effect of 12 U.S.C. 24 (seventh) is not appropriate or necessary, the Court declines to rule on that issue. Accordingly, the motion to strike that defense filed by plaintiff is moot. Therefore, the Court now enters final judgment as follows:

ORDERED, ADJUDGED and DECREED that

1. The First National Bank in Plant City was duly authorized by the Comptroller of the Currency of the United States to conduct armored car messenger and off-premises receptacle services consistent with the Comptroller's ruling 7490.

2. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not branches within the meaning of 12 U.S.C. 36 or in contravention of Section 659.06(1) (a) Florida Statutes.

3. The armored car messenger service and off-premises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City do not violate 12 U.S.C. 81.

4. The armored car messenger service and off-prem-

ises receptacle authorized by the Comptroller of the Currency and now operated by the First National Bank in Plant City are not in violation of or in conflict with Florida law.

5. Although plaintiff First National Bank in Plant City is entitled to a decree permanently enjoining Fred O. Dickinson, Jr., Comptroller of the State of Florida from interfering with the bank's operation of its armored car messenger and off-premises receptacle services, the defendant State Comptroller has stipulated in open court his intention to abide this Court's order without necessity for further injunctive relief, permanent injunction will therefore be withheld.

It is further ORDERED, ADJUDGED and DECREED that the Court's order of May 6, 1967, granting partial summary judgment and the accompanying memorandum decision are hereby incorporated in full into this Final Judgment.

In view of the Court's disposition of this case as ordered above, it is further ORDERED, ADJUDGED and DECREED that to the extent not heretofore granted or denied, intervening defendants' motions to produce, and motions to strike be and the same hereby are denied, and that plaintiff-intervenors' objections to interrogatories and motion for protective order be and the same hereby are sustained.

It is further ORDERED, ADJUDGED and DECREED that the temporary injunction entered against the defendant State Comptroller pending final determination in this action is dissolved and that the plaintiff First National Bank in Plant City and Home Indemnity Company, as its bondsman, be and the same hereby are discharged from any liability under the bond in the amount of $2,500 previously required by this Court's order,

It is further ORDERED, ADJUDGED and DECREED that the Court's Order Staying Proceedings in Case No. 155831 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida pending final disposition of this matter, be and the same hereby is rescinded and set aside upon assurance by counsel for the defendant Comptroller that motion to dismiss will be filed promptly in that cause of action previously enjoined.

It is further ORDERED, ADJUDGED and DECREED that all counter claims filed by defendant and intervening defendants be and the same hereby are dismissed with prejudice and final judgment is hereby entered for plaintiffs and against defendant and intervening defendants.

DONE and ORDERED in Chambers at Tallahassee this 2nd day of June 1967.

G. Harrold Carswell
G. HARROLD CARSWELL
United States District Judge

APPENDIX C

12 U.S.C. 36 provides as follows:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) (1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of

such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an iden-

tically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to state banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community.

Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-604 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

The original text of Section 7 of the McFadden Act of 1927 (44 Stat. 1228-1229), from which 12 U.S.C. 36 is derived, was as follows:

> Section 7. That section 5155 of the Revised Statutes of the United States be amended to read as follows:
>
> "SEC. 5155. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> "(a) A national banking association may retain and operate such branch or branches as it may have in lawful operation at the date of the approval of this Act, and any national banking association which has continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act may continue to maintain and operate such branch.
>
> "(b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.
>
> "(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.
>
> "(d) No branch shall be established after the date of the approval of this Act within the limits

of any city, town, or village of which the population by the last decennial census was less than twenty-five thousand. No more than one such branch may be thus established where the population, so determined, of such municipal unit does not exceed fifty thousand; and not more than two such branches where the population does not exceed one hundred thousand. In any such municipal unit where the population exceeds one hundred thousand the determination of the number of branches shall be within the discretion of the Comptroller of the Currency.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

"(g) This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

"(h) The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

Section 659.06(1) (a) of the Florida Statutes provides:

> Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the commissioner may require.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 777

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,
Petitioner,

vs.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION OF THE FIRST NATIONAL BANK IN PLANT CITY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT[1]

OPINIONS BELOW

The opinion of the District Court is reported at 274 F. Supp. 449. The opinion of the Court of Appeals for the Fifth Circuit is reported at 400 F. 2d 548.

1. References to the Appendix of this Brief are designated "A," and references to the Appendix of the Petition for Certiorari are designated "App." References to the Petition for Certiorari filed by The First National Bank of Plant City are identified as "Pet."

QUESTIONS PRESENTED

1. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida constitute branch banking in violation of the National Bank Act[2] and state branching law incorporated therein?

2. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida violate federal and Florida banking law?

STATUTES INVOLVED

In addition to the statutes cited by Petitioner, Florida Statute Section 659.06(2)[3] is involved:

> "(2) . . . The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); . . . ."

Title 12 United States Code Section 24 (seventh)[4] is also involved:

> "§24. **Corporate powers of associations**
>
> * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . ."

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2. *McFadden Act*, §§7 and 8, 44 Stat. 1228-29 (1927), as amended, *Glass-Steagell Act*, §23, 48 Stat. 189 (1933), as amended, 12 U.S.C. §36 (1964).

3. Laws of Florida, Ch. 28016 (1953), as amended, Laws of Florida, Ch. 276 (1965) (A. 1-2).

4. Rev. Stat. §5136 (1875).

STATEMENT OF THE CASE

In September, 1966, Petitioner, The First National Bank in Plant City, ("Petitioner Bank") began providing, without charge, bank armored car operations for its customers in Plant City, Florida, and the surrounding trade area. The armored car, which is owned, staffed, and completely controlled by Petitioner Bank, operates daily, six days a week. (R. 63-65, 485-87; see R. 1404-08 for pictures). Change is delivered to the customers' premises, and monies and checks for deposit are taken back to the bank. Petitioner Bank bears the entire cost of the armored car operation as well as sole responsibility for the monies during transit. (R. 487; State Banks Ex. 1, R. 517, 566).

About the same time, Petitioner Bank began operating an off-premises bank depository for its customers, also without charge. This facility is in a shopping center mall about one mile south of Petitioner Bank's main banking house. A receptacle for receipt of customers' monies and night bags is maintained there, together with a writing table equipped with bank forms and supplies, and a bench. (See R. 1398-1403 for pictures.) The facility is serviced daily by the bank's armored car.

Florida Statute Section 659.06(1)[5] requires all of the business of a bank to be transacted at its banking house or authorized drive-in and walk-up facilities. The operation of a drive-in or walk-up facility located anywhere other than the banking house property and contiguous property is prohibited. FLA. STAT. §659.06(2). By letter dated September 28, 1966, the Office of the Comptroller of the State of Florida ("State Comptroller") advised Petitioner Bank that its off-premises banking activities violate Florida law (R. 2096).

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5. Laws of Florida, Ch. 6426, §1 (1913).

Although admitting that it is carrying on the "business of banking" at its off-premises facilities (R. 22-23), Petitioner Bank contended it was not required to comply with Florida law because it was acting pursuant to rulings of the United States Comptroller of the Currency. Petitioner Bank asserted that it was operating the shopping center depository pursuant to a letter dated June 29, 1966, from the regional counsel for the office of the Comptroller of the Currency (R. 2093).[6] Petitioner Bank further asserted that it was authorized to operate the armored car by Paragraph 7490 of *The Comptroller's Manual for National Banks*, which provides as follows:

> "To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer." (R. 2092).

This ruling was announced by Comptroller of the Currency, James J. Saxon, in December, 1963, in *The National Banking Review* at 264.

Petitioner Bank accordingly purports to perform its off-premises banking operations pursuant to a "Comprehensive Dual Control Contract" or a "Messenger Transmittal" slip which states that Petitioner Bank is transporting the funds as "agent" for the customer (R. 2094-95: A.

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6. On deposition, regional counsel stated that his letter was not a ruling and that he was simply reiterating prior rulings made in the Washington office (R. 1017, 1019-20). However, the Washington "precedent file" which was made available to Respondents by court order neither contained nor reflected any such ruling (R. 1436-519).

3-4). The "Messenger Transmittal" slip further provides that the monies "shall not be deemed to be a deposit" until delivered to the banking house.

In October, 1967, Petitioner Bank filed an action against the State Comptroller, asserting that its off-premises banking operations are authorized under paramount federal law, and, further, that such activities do not violate Florida Statute §659.06 (R. 10-18). The Hillsboro Bank, Peoples Bank of Lakeland, and First Ruskin Bank ("Respondent Banks"), three state banks serving the same trade area as Petitioner Bank, were permitted to intervene as parties defendant. Thereafter, William B. Camp, Comptroller of the Currency of the United States, ("National Comptroller") intervened as a party plaintiff.

On May 6, 1967, the District Court granted Petitioner Bank and the National Comptroller a partial summary judgment[7] (R. 2047-60).[8] The District Court held that the documents used in the off-premises transactions conclusively establish that Petitioner Bank acts as agent for its customers and that Petitioner Bank is not receiving deposits off-premises. Although Petitioner Bank was found to be cashing checks through its off-premises operations, the District Court nevertheless determined that the operations were performed in substantial compliance with the National Comptroller's rulings. There was therefore held to

7. Preliminary to entry of summary judgment, the District Court held that, to prevail, Petitioner Bank had *only* to establish that its operations "substantially comply" with the National Comptroller's ruling (R. 991). The District Court then also severely restricted Respondents' efforts to pursue discovery, holding, *inter alia*, that they were entitled only to the names of *five* customers of Petitioner Bank, to be selected by Petitioner (R. 986-91). The nature of Petitioner Bank's operations, upon which final judgment was entered, was based on testimony of bank employees and their customers. Although the customers' testimony conflicted with the employees', the District Court held Petitioner Bank had met its burden of substantial compliance with the rulings. All of these rulings were attacked by Respondents on appeal.

8. 274 F. Supp. 449; App. 21a-32a.

be no violation of 12 U.S.C. §§36 and 81 as a matter of law. Holding that the off-premises banking operations did not violate Florida law, the District Court refused to rule upon the question of whether the off-premises banking operations are authorized as implied powers of national banks under 12 U.S.C. §24 (seventh). Final judgment was accordingly entered against Respondents on June 2, 1967 (R. 2061).

The Fifth Circuit Court of Appeals reversed,[9] holding that Petitioner Bank's off-premises armored car and shopping center depository operations constitute branch banking under 12 U.S.C. §36(f). The Court of Appeals then examined Florida Statute §659.06 and, concluding that such branching activities violated Florida law, held that such operations were prohibited to national banks under federal law.

REASONS FOR DENYING THE PETITION

Pursuant to a "policy of equalization," Congress incorporated state law on branch banking in 12 U.S.C. §36 and made it equally binding on national banks doing business within a state. The holding of the Court of Appeals that state law controls the establishment of branches by national banks is in accord with that statute and the pertinent decision of the United States Supreme Court in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). The *Walker Bank* principles were applied by the Fifth Circuit only to *branching operations* which were explicitly found to be present and not to any other phases of national bank operations.

Basic to the determination of the Fifth Circuit that the armored car and shopping center depository operations of Petitioner Bank constitute branch banking as

9. 400 F.2d 548; App. 1a-20a.

defined in 12 U.S.C. §36(f) was its holding that branching is a practical matter of function rather than bookkeeping and paper work, as contended by Petitioner Bank herein. This construction of the federal branching statute is consistent with both the precise terms thereof and the well-established Congressional policy of competitive equality in branch banking. Further, the Court's holding is consistent in principle with decisions of other courts of appeals.

Contrary to Petitioner Bank's assertion, the decision of the Court of Appeals in no way authorizes a state to prohibit any off-premises banking activity of a national bank as branching "even though the National Bank Act defines 'branch' in different and conflicting terms." (Pet. at 7). The Fifth Circuit expressly held that an off-premises activity must be a branch as defined in 12 U.S.C. §36(f) *before* state branching law comes into play. (App. 13a-16a).

The decision in question is correct on another ground. As the Court of Appeals recognized, the so-called "agency" and "deposit" documents used by Petitioner Bank in its off-premises banking operations are nothing more than devices to avoid the impact of the federal branching statute. The "agreements" have no practical effect on the customary relationship between the bank and its customers and Petitioner Bank is in fact receiving deposits and cashing checks off-premises. These operations constitute branch banking under the terms of 12 U.S.C. §36(f). If the provisions of 12 U.S.C. §36 could be negated by the simple subterfuge of "deposit" and "agency" agreements, obviously national banks would be free to branch bank irrespective of state law. Therefore, if any vestige of competitive equality is to prevail in the branching area, the decision of the Fifth Circuit Court of Appeals to consider

branch banking as a matter of substance rather than form is correct.

Additionally, there is another ground upon which the decision can be sustained. The off-premises armored car and depository operations of Petitioner Bank are not authorized under the National Bank Act as express or implied powers. Since there is no paramount federal law, Florida law prohibiting such operations is applicable to and must be honored by Petitioner Bank.

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

(A) There is no paramount federal law authorizing the off-premises banking operations of Petitioner Bank.

Petitioner Bank states that there is an important question of federal law involved because state law was improperly applied to national banks. Relying on *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), Petitioner Bank incorrectly asserts that state law does not apply to national banks except in those instances where Congress has expressly made a particular phase of national banking subject to state law. It is true that, electing to follow a policy of equalization between national and state banking associations, Congress has expressly adopted state law as the standard for national banks in some competitive areas. Petitioner Bank miscites *Franklin*, however, which also recognizes that, "even in the absence of such express language," national banks may be subject to state law if there is no conflict with federal law. 347 U.S. at 378. Hence, the decision of the Court of Appeals herein to apply state law to national banks is consistent with the *Franklin* case as well as other hold-

ings of the Supreme Court that state law generally operates upon the activities of national banks except when it conflicts with federal law. *McClellan* v. *Chipman*, 164 U.S. 347 (1896); *First National Bank* v. *Missouri*, 263 U.S. 640 (1924).

Petitioner Bank further states, however, that its off-premises banking operations are authorized under 12 U.S.C. §24 (seventh) as an implied power of national banks so that state law is preempted, and that the District Court so held. Although Respondents attempted to raise this issue below, the District Court refused to rule upon it, stating it was not "appropriate or necessary" to consider whether Petitioner Bank's off-premises activities were authorized under 12 U.S.C. §24 (seventh) (R. 2061; App. 32a). Nevertheless, the point now re-occurs as if decided by the courts below. (Pet. at 9).

Respondents assert that the off-premises armored car and depository facilities of Petitioner Bank are *not* authorized as implied powers under the National Bank Act. In *First National Bank* v. *Missouri, supra*, the Supreme Court expressly held that *"the mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business,* within the meaning of [12 U.S.C. §24 (seventh).]" 263 U.S. at 659. (Emphasis supplied). Yet "multiplication of places" where a bank may exercise its powers of receiving deposits and cashing checks is precisely what is asserted herein to be implied as an incidental power of national banks.

Merchants' National Bank v. *State National Bank*, 77 U.S. 604 (1871), cited by Petitioner Bank at pages 8-9 of its Petition as authorizing off-premises agency activities "such as those involved here" merely held that, since

national banks clearly had the power to purchase gold, they could pay for it off-premises. Thus, Petitioner Bank's only authority for its statement is a 1911 opinion[10] of the United States Attorney General holding that a national bank could appoint agents "to receive and collect money and forward it to the bank." However, legislative debates over the federal branching statute establish that one of the primary objectives of Congress was *to overrule that opinion* by expressly prohibiting such agency activities of national banks unless permitted to state banks under state law. 66 Cong. Rec. 1464, 1627 (1925); 67 Cong. Rec. 2840-41, 3232 (1926). Consequently, an "agency" where "deposits are received, checks paid, or money lent" is specifically defined in 12 U.S.C. §36(f) as a branch. Since national banks are expressly prohibited from performing these functions through off-premises agencies unless authorized by state statute, it is difficult to see how such operations could be an implied power of national banks in derogation of state law. As the Supreme Court recognized in the *Missouri* case, "an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted." 263 U.S. at 659.

(B) The off-premises banking operations of Petitioner Bank constitute branch banking under 12 U.S.C. §36 which specifically incorporates state branching law and makes it applicable to national banks.

Title 12 U.S.C. §36 provides that a national banking association may establish and operate a branch only if this is expressly authorized to state banks by the law of the state in question. Nevertheless, Petitioner Bank states

10. 29 *Op. Att'y Gen.* 81, 90 (1911).

that the Fifth Circuit wrongly held that Florida branching law controls the legality of the off-premises banking operations of Petitioner Bank in the instant case. (Pet. at 7).

It is asserted that the decision potentially permits any off-premises activity of a national bank to be prohibited under state law as a branch "even though the National Bank Act defines 'branch' in different and conflicting terms." (Pet. at 7). However, in its attempt to demonstrate that certiorari should be granted, Petitioner Bank distorts the actual holding of the Court of Appeals by quoting isolated phrases out of context.

The Court of Appeals expressly held that federal law initially controls the question of what is a branch, and application of state law was limited to operations initially found to be branch banking under the National Bank Act. The Court stated that 12 U.S.C. §36(f) determines " '*prima facie* if the supplementing state branching law should come into play.' " (App. 13a). It was stressed that state law comes into play *only after* a determination has been made that the facility constitutes a branch under section 36(f). (App. 13a-14a). As the Court expressed it, if the facility possesses the characteristics of a branch as defined in section 36(f), "we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character.' " (App. 15a).

1. There is no conflict with decisions of other Circuits.

Respondents submit that the decision of the Court of Appeals that section 36(f) establishes the functional test of a branch accords completely with provisions of the fed-

eral branching statute and with the decisions of other courts on this point.[11]

In section 36(f),[12] Congress specifically used the term "include" in defining a branch. The word "include" is generally held to connote an illustrative and partial definition. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). The Fifth Circuit Court recognized this in holding that section 36(f) is a "partial, functional definition" of a branch. On the other hand, this particular point was not raised or ruled upon in the cases cited by Petitioner Bank as conflicting with the decision of the Fifth Circuit Court.[13]

Camden Trust Co. v. *Gidney*, 301 F.2d 521 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886 (1962), involved totally different facts and issues than the instant case. In *Camden*, the question presented was whether a national bank which had established a new bank as "a completely separate entity" was thereby branch banking. The Court of Ap-

11. The Fifth Circuit's decision in no way conflicts with its earlier decisions. In *Texas* v. *National Bank of Commerce*, 290 F.2d 229 (1961), *cert. denied*, 368 U.S. 832 (1961), the Fifth Circuit held that, since the Secretary of Treasury was authorized by federal statute to permit national banks to open and maintain banking facilities on federal military installations in Texas, the state could not limit such facilities under the provision against branch banking. The Court of Appeals recognized state branching law and policy, holding only that "in these circumstances" it had to "give way slightly. . . ." *Id.* at 234. In *Jackson* v. *First National Bank*, 349 F.2d 71 (1965), the Fifth Circuit Court applied state law to off-premises banking operations of a national bank after determining that such operations constituted a branch under section 36(f). The Fifth Circuit followed exactly the same course of action in the instant case, relying in part on the *Jackson* case in so doing.

12. "The term 'branch' as used in this section *shall be held to include*. . . ." (Emphasis supplied).

13. For instance, in *Metropolitan National Bank* v. *Camp*, 281 F. Supp. 238 (D.C. Mich. 1968), the District Court simply found that the activities did not meet the statutory definition of a branch in section 36(f).

peals for the District of Columbia held that the new bank was not a "branch" as defined in section 36(f), and that, although the new bank might be an "affiliate," Congress recognizes a distinction between a "branch" and an "affiliate." The decision herein does not conflict with the statement in *Camden* that Congress defined a "branch" in section 36(f). The Fifth Circuit similarly held that this section provides a definition of branching but then went on to hold that the definition was partial and functional rather than exclusive.

In *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), the proposed new bank was clearly not an "affiliate" and a branching operation was found to exist. Noting that Congress gave a broad meaning to the word "branch" in section 36(f), the Court of Appeals for the District of Columbia held that "the nature of the arrangement, and not the label applied to it" determines whether there is a branching operation. *Id.* at 301. The Fifth Circuit's refusal to construe section 36(f) "as permitting paper evasions from state anti-branching laws" is certainly consistent with that decision. (App. 17a).

The Court of Appeals for the District of Columbia was subsequently presented with almost exactly the same issue as that involved herein. In *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), the question was what, for purposes of the National Bank Act, is a "state bank" as defined in 12 U.S.C. §36(h).[14] The District Court held that "only the construction of a federal statute is at issue" but the Court of Appeals for the District of Columbia *reversed*, holding that, even

14. Title 12 U.S.C. §36(h) defines "State banks" as *including* "trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws".

though §36(h) did not expressly adopt state law, it is part of a federal statute reflecting a policy of coordination of state and federal law. The Court concluded that *"it would be unsound to assert that the proper interpretation of §36(h) is independent of state policy and legislation."* *Id.* at 705. (Emphasis supplied). Respondents submit that the decision of the Fifth Circuit Court of Appeals herein is completely consistent with the decision of the Court of Appeals for the District of Columbia in *Nuesse*, as well as the prior decisions of that Circuit.

2. There is no conflict with the Walker Bank case.

Petitioner Bank's assertion that state branching law is inapplicable to its off-premises banking operations is essentially the same as the proposition urged by the National Comptroller in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It is contended herein that, since state law was not expressly incorporated under section 36(f), state law defining branching does not bind national banks. Similarly, in *Walker Bank*, the National Comptroller argued that section 36(c)(2) [dealing with branching beyond city limits] expressly incorporated state branching restrictions whereas section 36(c)(1) [dealing with branching inside city limits] did not. This allegedly showed a congressional intent that state branching restrictions did not bind national banks under section 36(c)(1).

The Supreme Court held, however, that national banks are subject to the restrictions of state branching law, observing that it "is a strange argument that permits one to pick and choose what portion of the law binds him." 385 U.S. at 261. It was held that the restriction, regardless of how it was designated, was an integral part of state branching policy which was absorbed under section 36(c). There-

fore, the National Comptroller's argument was rejected in *Walker Bank* for reasons equally applicable herein.

In the instant case, the off-premises banking operations of Petitioner Bank were determined to be branch banking as defined in 12 U.S.C. §36(f). Only then did the Court of Appeals look to the laws of Florida to determine whether or not such activities were permitted to state banks under state law. Clearly this is the direction of 12 U.S.C. §36 and the decision of the Supreme Court in *Walker Bank*.

Petitioner Bank states, however, that the decision of the Court of Appeals is an improper extension of the *Walker Bank* decision. This assertion is premised upon its unwarranted assumption that the Fifth Circuit applied state law to all off-premises activities of national banks. (Pet. at 11). Based upon this assumption, Petitioner Bank attempts to show conflict with *Walker Bank* by portending various applications of such a holding.

Respondents submit that the mere listing of remote analogies which might be subsequently made does not establish any present or direct conflict of decisions. Moreover, the potential consequences which have been suggested by Petitioner Bank are not in any way warranted under the decision herein.

The decision of the Fifth Circuit does not grant the power for states "to determine that virtually any national bank activity performed off-premises was unlawful" as asserted by Petitioner Bank (Pet. at 10). Since the activity must be a branch as defined under section 36(f) before state branching law ever comes into play, any facility which did not have the characteristics of a branch under federal law would not be controlled by state law.[15] Accordingly, a

15. It is significant that the only instances cited by Petitioner Bank where off-premises banking operations of a national bank

state could never prohibit an activity of a national bank by defining a branch in "different and conflicting terms" from section 36(f). For instance, separate data processing facilities could not be prohibited under state law as branching, as Petitioner Bank portends, because that is not a functional characteristic of branch banking under section 36(f). Similarly, solicitation of new business, correspondent services, and credit card operations do not involve the establishment of an additional place of business, and, hence, could not be prohibited to national banks under state branching law.

Nor does the decision below give *state banking commissioners* the prerogative to arbitrarily originate a definition of branching activities of national banks. In the instant case, there is a *state statute* which the Court expressly found was violated by Petitioner Bank's off-premises banking operations. There is obviously an interest on the part of the state and its banking officials in enforcing its branching laws both as to state and national banks. This was early recognized in *First National Bank* v. *Missouri*, 263 U.S. 640, 659-660 (1924), where the Supreme Court held that, since the sanction behind branching law as applied to national banks is that of the state, the power of enforcement must similarly rest with the state. The decision of the Fifth Circuit herein simply recognizes the right of such state officials to assert state law as to branching operations of national banks as well as state banks.

(C) The off-premises banking operations of Petitioner Bank violate Floride Statute Section 659.06.

Under Florida Statute Section 659.06, all the business of a bank is required to be performed at its banking house

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have been ruled to violate state branching law have involved off-premises deposit machines (similar to the shopping center depository used herein). Such facilities meet the test of a branch under 12 U.S.C. §36(f) since deposits are received there.

and authorized drive-in or walk-up facilities. (App. 35a-36a).

A bank drive-in or walk-up facility is authorized under Florida law only *if it is located on the same property as the main banking house or on property contiguous thereto.* FLA. STAT. §659.06(2). Yet Petitioner Bank's walk-up depository facility is located in a shopping center about *a mile away* from the Petitioner Bank's building in Plant City, and the armored car operates many miles away.

Petitioner Bank and the National Comptroller acknowledge that the pick-up of deposits from and delivery of currency to customers off-premises by employees of Petitioner Bank operating its armored car constitutes the performance of banking business. (R. 22-23, 569-70). The Fifth Circuit expressly found that such off-premises activities constituted the business of banking in violation of Florida Statute §659.06(1).

Petitioner Bank argues that the Fifth Circuit's application of Florida Statute Section 659.06(1) is in conflict with decisions of other courts holding that "regulations or interpretations of State Banking Commissioners are not to be considered in determining what the statute law of the state permits or prohibits with respect to national bank branches."[16] (Pet. at 17). No such conflict exists.

In the instant case, the Fifth Circuit Court itself construed the Florida statute. Noting that Florida Statute §659.06(1)(a) is "uncomplicated, unhedged and unmodi-

16. The cases cited by Petitioner Bank do not so hold. In *Union Savings Bank* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964) and *Leuthold* v. *Camp*, 273 F. Supp. 695 (D. Montana 1967), the federal court simply disagreed with rulings by state officials that the activities complained of violated state statutory law and therefore refused to be bound by such rulings. In *South Dakota* v. *National Bank*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), there was no state statute embodying the branching restriction sought to be enforced by the state banking officer.

fied," the Fifth Circuit Court specifically found that, "unless we were to cast away all concepts of the functional 'business' of a bank, *we would have to conclude* that First National was 'doing business' with its extra services." (App. 19a) (Emphasis supplied). Thus, the Court did not simply rely on the statutory interpretation of the State Comptroller, although its interpretation of Florida Statute §659.06 is consistent with the State Comptroller's. (App. 18a).[17]

Petitioner Bank also argues that the Fifth Circuit erroneously abdicated its duty to construe state branching law by conditioning its decision on the outcome of pending state court litigation. As was previously pointed out, however, the Court of Appeals itself specifically considered and determined the question of whether the banking operations violated state law. Unlike the case of *Howell* v. *Citizens First National Bank*, 385 F.2d 528 (3rd Cir. 1967), there was no "abstention" by the Fifth Circuit Court. The Court merely retained jurisdiction in an effort to protect Petitioner Bank from a defense of "res judicata" in the event state courts subsequently permitted state banks to perform such off-premises operations.

II.

THE DECISION OF THE COURT OF APPEALS IS CORRECT ON ANOTHER GROUND.

The decision sought to be reviewed herein is correct for other reasons as well. The Court of Appeals properly refused to permit Petitioner Bank to use the subterfuge of "agency" and "deposit" agreements as a means of avoiding the provisions and policy of the federal branching statute. Respondents submit that the Fifth Circuit instead correctly found that Petitioner Bank is receiving deposits and cashing

17. See also, the opinion of the Florida Attorney General to the same effect on an analogous point. 58 *Op. Fla. Att'y Gen.* 110 at 616 (1958).

checks at its off-premises facilities and thereby branch banking in direct contravention of the terms of section 36(c) and (f).

(A) Petitioner Bank is cashing checks and receiving deposits at its off-premises facilities.

A major service of Petitioner Bank's off-premises armored car operations is the delivery of currency to the customer's premises. The District Court expressly found that "insofar as such change is delivered in exchange for checks, this practice may amount to cashing checks off the bank's premises . . . ." (R. 2058-59; App. 30a). Performance of this function alone necessarily rendered the operation of the armored car an illegal branch facility under the terms of 12 U.S.C. §36(c) and (f).

Furthermore, the *physical* and *functional* act of receiving deposits is completed by Petitioner Bank at facilities away from its banking house. Possession of and responsibility for the deposits is transferred by the depositor to and is accepted by Petitioner Bank at its off-premises facilities. Nothing remains for the depositor to do to complete the making of the deposit, and the only thing which remains for Petitioner Bank to do is to "accept" the deposit. Petitioner Bank has, of course, never refused to "accept" a deposit received off-premises by its messenger. (R. 938).

Respondents submit that Petitioner Bank is thereby receiving deposits off-premises. The federal branching statute prohibiting this operation cannot be evaded by means of a contract asserting that the bank is receiving the deposits as agent for the customer and that the deposits are not accepted until they reach the banking house.

In the first place, section 36(f) makes *receipt* and not acceptance of deposits the indicia of a branch. That Petitioner Bank is *receiving* deposits off-premises is established

by *State Chartered Banks* v. *Peoples National Bank*, 291 F. Supp. 180 (D.C. Wash. 1966). There the national bank argued that it was not cashing checks within the meaning of 36(f) because entry of the check on its books and transmittal of the check to the drawee bank was done at the main banking house. Holding that branch banking is a matter of function and not bookkeeping, the District Court found that the bank was branch banking as defined in §36 (f). The Fifth Circuit Court herein subscribed to that decision completely, holding that one important reason that it did so was that:

> *"we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language."* (App. 16a) (Emphasis supplied).[18]

In the second place, regardless of the self-serving statements in the so-called "agency" agreements, the evidence established without question that Petitioner Bank is *not* in fact acting as agent for its customers when it receives monies off-premises. The agent's power to bring about business relations between the principal and third persons, control of the principal over his agent's actions, and a primary obligation of the agent to act for the benefit of his principal are elementary factors in the principal-agent relationship. In the instant case, *none* of the requisite characteristics of an agency relationship exist between Petitioner Bank and

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18. Petitioner Bank has stated that the Court of Appeals "apparently" agreed with the District Court below that it was not receiving deposits off-premises in view of the contractual documents providing to the contrary (Pet. at 9). Respondents submit that, on the contrary, the Court of Appeals clearly rejected that holding. App. 10a, 16a. The Court of Appeals noted that Respondents contested the extent of Petitioner Bank's compliance with its purported procedures relating to contract and agency, but found such disputes irrelevant "in light of our decision." App. 6a. This could only be so if the Court of Appeals concluded that the agency and deposit agreements did *not* whitewash the off-premises operations.

its customers. Clearly an agency relation does not exist merely because the parties designate their relationship as such. Restatement (Second) of Agency §1 at 8 (1957); 1 Fla. Jur. *Agency* §5 (1955); see also, *Bartels* v. *Birmingham*, 332 U.S. 126 (1947).

(B) The off-premises banking operations of Petitioner Bank have traditionally been considered branch banking.

Prior to passage of the McFadden Act in 1927, national banks had no legal power to branch bank. *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). Nevertheless, it was apparent to Congress that national banks were being authorized by the Comptroller of the Currency to branch bank through various subterfuges, *including off-premises agencies*. 66 Cong. Rec. 1627, 1777, 4410 (1925); 67 Cong. Rec. 3232, 3241 (1926). Branch agencies were consequently expressly included in section 36(f).

Accordingly, for many years the office of the Comptroller of the Currency ruled[19] that off-premises agency operations of the exact nature involved herein constituted branch banking. (R. 1436-519). However, in late 1963, Comptroller Saxon ruled there was no branching under such circumstances so long as the bank utilized a contract stating that it was acting as agent for its customer, regardless of whether or not an agency relationship actually existed.[20]

As a result of this ruling, Petitioner Bank is receiving deposits and cashing checks off-premises, but attempting to

19. Prior to Saxon's ruling, the Comptroller of the Currency required an *actual* agency relationship to exist between the customer and an armored car service which delivered monies to and from a national bank. (R. 1466-67, 1477; A. 6-7).

20. The requirement of the so-called "agency" and "deposit" agreements is admittedly imposed by the office of the Comptroller of the Currency in order to avoid the prohibitions of 12 U.S.C. §36. (R. 1493).

evade the express prohibition of such activities under 12 U.S.C. §36 by the device of "deposit" and "agency" agreements between the bank and its customers. Respondents submit that the Fifth Circuit properly held that such devices were mere subterfuges and that the congressional intent to insure competitive equality between national and state banks in the matter of branching should not be permitted to be destroyed by such devices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

V. CARROLL WEBB
General Counsel to Comptroller of the State of Florida
The Capitol
Tallahassee, Florida

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER
P. O. Box 3239
Tampa, Florida 33601

By .....
WM. REECE SMITH, JR.

APPENDIX

A. STATUTES

FLORIDA STATUTE § 659.06

659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main

banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

TITLE 12, UNITED STATES CODE § 24 (SEVENTH)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . .

B. DOCUMENTS USED BY PETITIONER THE FIRST NATIONAL BANK IN PLANT CITY IN ITS OFF-PREMISES OPERATIONS.

THE *First* NATIONAL BANK
IN PLANT CITY
PLANT CITY, FLORIDA 33566

MESSENGER TRANSMITTAL

_____
(Principal)

_____
(Address of Principal)

_____
(Date)

NATIONAL BANK, Plant City, Fla. as messenger and for Principal named above will transmit to the bank-ner the following, in accordance with the contract on erse side hereof:

PLEASE LIST CHECKS BELOW

	DOLLARS	CENTS

ACCOUNT NUMBER

TOTAL DEPOSIT	COIN	CURRENCY	TOTAL CHECKS	

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED

RECEIPT OF MESSENGER

Received locked bag stated to contain the sum shown above ☐ INITIAL

The above total received and verified ☐ INITIAL

CONTRACT

First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

The bank maintains hazard insurance covering holdup, employee fidelity, etc. for the protection of the Principal for all amounts and items delivered to the bank's messenger by said Principal.

Messenger Transmittal Slip

(R. 2095)

Comprehensive Dual Control Contract [R. 2094]

THE FIRST NATIONAL BANK IN PLANT CITY,

Plant City, Florida

Messenger Service

Comprehensive Dual Control Contract

As agent for the undersigned depository, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

Under the COMPREHENSIVE DUAL CONTROL CONTRACT, all monies, transported solely in padlocked money bags furnished by bank, shall be opened only under the dual control of two bank's tellers. For this purpose, bank will retain a pass key for depositor's bag(s); a key for each bag will be furnished depository. The depositor expressly authorizes the service described and agrees to accept the bank's count of monies as final.

The First National Bank in Plant City maintains hazard insurance covering holdup, employee fidelity, etc., for the benefit of the depositor for all amounts delivered to bank's messenger for delivery to bank and for all amounts requisitioned by depositor for delivery from bank to depositor. Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank's messenger for monies delivered to depositor.

The bank acknowledges the receipt of $..... representing a service charge for ..... bags, $..... of which shall be refunded upon the termination of service and return of said bags.

This contract shall remain in full force until terminated by either party.

.....

Depositor

The First National Bank in Plant City

By .....

Date .....

September 11, 1963 [sic—1953].

Dear Mr. Morris:

Reference is made to your letter of August 18, 1953, addressed to Chief National Bank Examiner R. S. Beatty, which Mr. Beatty has referred to this office for reply. The question raised there is the permissibility of one of the directors of your bank operating an armored car service in Cheyenne.

It would appear that any objectionable features of the plan would not directly arise from the fact that a bank director is operating an armored car service, but rather, difficulty may occur from the nature of the services a director-owned corporation might render your bank. The term "branch" is defined in Section 5155 of the Revised Statutes (12 U.S.C. 36) to include

> "* * * any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

In interpreting this section this office regards the crucial point to be whether those persons receiving deposits outside the banking quarters are acting as agents of the bank. In determining such a relationship we consider, among other things, whether the service purports to act as representative of the bank, whether the service is compensated by the bank rather than by the customer, whether responsibility for loss would be borne by the bank or by the armored car service, etc. Should any one of these factors be found to exist then the entire activity would be an illegal branch banking activity.

We have no objection if a plan is arranged under which an armored car service acts as the agent of depositors, and the bank has no responsibility, apparent or otherwise, for the deposits until they reach the banking quarters. We could not say, as a matter of law, that a director of your bank could not engage in such an activity. However, this

office will examine with great care any arrangement arrived at between your bank and an armored car service operated by a bank director.

Yours very truly,

/s/
Deputy Comptroller of the Currency

* * *

May 31, 1962

Dear Mr. Crockett:

This is in reply to your letter of March 22, 1962, in which you have inquired as to the existence of regulations governing the activity of bank couriers or messengers who deliver cash to customers and pick up deposits from them. You state that your principal interest is in possible distance limitations on such operations.

The furnishing of this type of service by a bank often comes into conflict with the provisions of 12 U.S.C., Section 36, as constituting an illegal branch banking activity. This section defines a branch as any place "at which deposits are received, or checks paid, or money lent." We have maintained that the practice of furnishing mobile pick-up service of the deposits of customers is a type of branch banking which the statutes do not permit. As to the delivery of cash to customers, we have not objected when the customer's check for the full amount is presented to the bank for payment prior to the departure of the messenger, so that it cannot be said that the checks are being cashed away from the banking premises.

On the other hand, we would not object if a group of your customers hired a messenger to perform a deposit pick-up service at their expense. In such an arrangement, the messenger would be the agent of the customer and not of the bank, and no deposit is effected until the funds reach the bank.

There are no distance regulations as to those operations which comply with the foregoing.

Very truly yours,

(Signed) G. W. Garwood
Deputy Comptroller of the Currency

DEM:mz—5/29/62

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief and Appendix was furnished, on behalf of Respondents, Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, by airmail, postage prepaid, this ..... day of ....., 1969, to Robert S. Edwards, Esquire, Post Office Box 1119, Plant City, Florida 33566, Attorney for Petitioner, The First National Bank in Plant City, and to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530.

.....

WM. REECE SMITH, JR.
Attorney for Respondents:
Fred O. Dickinson, Jr.,
Comptroller of the State of Florida,
The Hillsboro Bank,
First Ruskin Bank,
Peoples Bank of Lakeland

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,
Petitioner,

vs.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE COMPTROLLER OF THE CURRENCY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED[1]

1. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida constitute branch banking in violation of the

1. References to the Appendix of this Brief are designated "A." The Petition for Certiorari filed on behalf of the Comptroller of the Currency is identified as "Pet." and the Appendix thereto as "App."

National Bank Act[2] and state branching law incorporated therein?

2. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida violate federal and Florida banking law?

STATUTES INVOLVED

In addition to the statutes cited by Petitioner Comptroller of the Currency, Florida Statute Section 659.06 (2)[3] is involved:

> "(2) . . . The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); . . . ."

STATEMENT OF THE CASE

Respondents incorporate by reference herein the Statement of the Case contained in Respondents' Brief in Opposition to the Petition of The First National Bank in Plant City for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (No. 777, this Term).

REASONS FOR DENYING THE PETITION

Petitioner Comptroller seeks to cast the decision below as a power struggle by state banking authorities to exert control over all off-premises activities of national banks in derogation of the federal laws and banking authority. In so doing, the Comptroller ignores the basic, factual is-

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2. *McFadden Act*, §§7 and 8, 44 Stat. 1228-29 (1927), as amended, *Glass-Steagell Act*, §23, 48 Stat. 189 (1933), as amended, 12 U.S.C. §36 (1964).

3. Laws of Florida, Ch. 28016, §659.06(2) at 81 (1953), as amended, Laws of Florida, Ch. 276 (1965) (A. 1-2).

sue involved in this case, thereby presenting a misleading characterization of the decision sought to be reviewed. In essence, the Court of Appeals, being aware of the practicalities of the banking business, held that branchness is a matter of function rather than label. Refusing to be bound by the form of Petitioner Bank's off-premises banking operations, the Court of Appeals considered their substance. Accordingly, the Court below concluded that the off-premises armored car and shopping center depository operations of Petitioner Bank constitute branch banking in violation of the federal and Florida branching laws.

It is imperative to recognize the true nature and extent of the off-premises banking operations herein. What Petitioner Comptroller vaguely describes as off-premises agency activities are in fact bank operations *established for the purpose of receiving deposits and cashing checks off-premises.* These are, of course, the very banking operations defined in 12 U.S.C. §36(f) as constituting a branch.

Clearly Petitioner Bank is receiving deposits and cashing checks off-premises in contravention of federal and state branching law. The District Court expressly found that Petitioner Bank was cashing checks off-premises. Further, Petitioner Bank accepts possession of and complete responsibility for deposits off-premises. The Court of Appeals' determination that these particular off-premises banking operations constitute branch banking within the meaning of 12 U.S.C. §36 is correct and consistent with the federal statute and pertinent decisions.

Respondents respectfully submit that the decision of the Court of Appeals can be sustained on a number of different grounds. Indeed, under the facts involved, no other result could be reached.

ARGUMENT

I.

There Is No Important Question of Federal Law.

Since national banks are federal instrumentalities, Congress clearly could have barred the applicability of state law to national banks. Instead, Congress elected to follow a "policy of equalization" between national and state banks by expressly adopting state law in many important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). Additionally, Congress did not, as a general rule, preclude the application to national banks of state law which does not conflict with federal law.[4] *McClellan* v. *Chipman*, 164 U.S. 347 (1896); *First National Bank* v. *Missouri*, 263 U.S. 640 (1924).

Thus, Congress has given a special significance to state law as applied to national banks in many areas of banking. This is especially important in view of the factual nature of the banking operations involved in this case. Nowhere has the congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in section 36(c) wherein Congress required the Comptroller of the Currency to follow state law as the standard for branching by national banks.

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4. In some instances, Congress has expressly limited state power over national banks. For instance, 12 U.S.C. §548 prescribes the only ways in which states can tax national banks. The recent decision of *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968), relied upon herein by Petitioner Comptroller, is concerned with construction of that statute. It was *not* held in that case, as stated by Petitioner Comptroller, that the activities of national banks are immune from state law unless expressly incorporated by federal law.

A. The decision of the Court of Appeals is consistent with the terms, policy, and legislative history of the federal branching statute.

Petitioner Comptroller asserts that state banking authorities are authorized under the decision below to determine the lawfulness of any off-premises activity of a national bank, and that an important federal question is thereby raised. However, Petitioner Comptroller's argument is premised on an incorrect and incomplete characterization of the decision of the Court of Appeals.

Petitioner Comptroller first asserts that the Court held that state law controls the "threshold determination" of what off-premises banking activities constitute a branch (Pet. at 2). The Court of Appeals did not so hold. It stated instead, and precisely to the contrary, that the threshold determination of branching is controlled exclusively by federal law.

The Fifth Circuit held that 12 U.S.C. §36(f) provides "'a partial, functional definition for determining *prima facie* if the supplementing state branching law should come into play.'" (App. 28). If the proposed off-premises operation possesses the characteristics of a branch within the meaning of section 36(f), the "threshold of federal law" has been passed over, and only then is state law turned to for a further consideration of its character (App. 31). Thus, the Court of Appeals clearly held that federal law, and *not* state law, controls the "threshold determination" of what off-premises activities of a national bank constitute a branch.

Nevertheless, Petitioner Comptroller repeatedly asserts that the decision below will permit a state to prohibit any off-premises activity of a national bank as branching (Pet. 11-13). Clearly this could not occur under the de-

cision sought to be reviewed.[5] State law prohibiting an off-premises banking activity as branching applies to national banks *only if* the activity in question first meets the test of branchness set forth in section 36(f) (App. 29). Many of the off-premises activities of national banks listed by Petitioner Comptroller, such as new-business solicitation and banking by mail, are not performed at an additional place of business; other activities, such as data processing, do not involve the functional characteristics of a branch because no customer service is involved. Such off-premises operations would not pass the threshold test of a branch under section 36(f), and could therefore not be prohibited to national banks by state branching law.

The holding of the Court of Appeals that section 36(f) provides a functional, threshold definition of a branch is consistent with the statutory language of that section. Congress defined a "branch" in terms of "include," which connotes an "illustrative application of the general principle" and *not* an all-embracing definition. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

That Congress intended section 36(f) to be a flexible, illustrative definition of a branch is further confirmed by its contemporaneous construction of the section. Representative McFadden stated that a branch was defined under section 36(f) as "any place outside of or away from the main office where the bank carried on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office. . . .*"

5. Petitioner Comptroller refers at page 12 to a recent ruling by the Georgia banking commissioner that "certain loan-production activities of a national bank" were illegal. The Commissioner simply ruled that the loan production offices established *by out-of-state banks* "for the purpose of performing any and all banking functions normally conducted by the parent bank with the exception of issuing checks" would constitute a branch bank in violation of the Georgia branching statutes (A. 3).

68 Cong. 5816 (1927) (Emphasis supplied). This characterization of a branch is, of course, much broader than the provisions of section 36(f) itself, demonstrating that Congress considered that definitional section to be inclusive rather than restrictive.

Disregarding the inclusive language actually employed by Congress in defining a branch, Petitioner Comptroller attempts to infer an inapposite Congressional purpose from language omitted from the statute. It is asserted that Congress would have expressly incorporated state law defining branching in section 36(f) if it had intended it to be applicable to national banks. This is, of course, the same argument urged by the National Comptroller in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), with regard to the applicability of state branching restrictions to national banks under 12 U.S.C. 36(c)(1). It prompted this Court to observe that "it is a strange argument that permits one to pick and choose what portion of the law binds him." 385 U.S. at 261. Petitioner Comptroller also made this same argument[6] in *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), contending that construction of sub-section (h) was a purely federal question because state law defining state banks was not expressly incorporated in that section. The Court of Appeals for the District of Columbia rejected this argument, holding that section 36(h) should be interpreted in light of state policy and legislation since it is part of a federal statute reflecting a "pervasive policy of coordination." *Id.* at 705.

Petitioner Comptroller also states that Congress must have intended section 36(f) to be a restrictive definition because it governs not only the establishment of new

6. Contrary to Petitioner Comptroller's assertion (Pet. at 7), Congress did *not* expressly incorporate state law in either subsection (e) or (h).

branches but other matters as to which state law has no pertinence (Pet. at 6). However, Petitioner Comptroller is hoisted on his own petard. Since the definitional section relates to a variety of matters, it is more reasonable to assume, as did the Court below, that Congress incorporated a flexible definition of branching. As to the establishment of new branches by national banks, a matter controlled by state law, the test of branchness is two-fold; if the off-premises facility is a branch within the meaning of section 36(f), then state law is further considered to determine whether the facility is a branch. As to matters unrelated to state law, there is simply no need to take the second step of looking to state branching law.

It is asserted by Petitioner Comptroller that state law as to what is branching is irrelevant to national banks because Congress did not intend for the application of the branching conditions in section 36 to vary from state to state (Pet. at 8). The very language of section 36 refutes this assertion. It is provided there that the conditions upon which national banks may establish and operate branches are the following:

> "(c) . . . (1) Within (a municipality) . . ., *if . . . authorized to State banks by the law of the State in question*; and (2) at any point within the State . . . *if . . . authorized to State banks by the statute law of the State . . . and subject to the restrictions as to location imposed by the law of the State on State banks.*" 12 U.S.C. §36(c) (Emphasis supplied).

Manifestly Congress did intend for the conditions upon which national banks can establish and operate new branches to vary from state to state.[7]

7. Underlying section 36 is the Congressional recognition that each state is best able to decide what type of banking structure is best suited to its economy. Realizing that the economies vary widely from state to state and that what is suitable for a densely populated industrial state is not necessarily suitable for

Throughout the Petition herein, it is urged that there is a danger that states will enact "unfriendly legislation" and make "extreme use" of state branching law (Pet. at 12-13). This specter is illusory, however, since state branching law controls state banks as well as national banks. It is unlikely that any state would elect to cut off its nose to spite the face. On the other hand, if state law defining branching were inapplicable to national banks, then, as the Court below recognized, the National Comptroller could "by means of oracular definitions" distort what states considered branching into non-branching (App. 33). In this way, the United States Comptroller could give national banks a substantial competitive edge in the branching area, contrary to the specific purpose and policy of the federal branching act. *Clearly competitive equality cannot exist in the branching area if, in any given state, state and national banks are governed by separate and inconsistent definitions of branching.*

The decision below is finally portrayed by Petitioner Comptroller as causing an "unacceptable disruption of the administration of the federal banking laws." (Pet. at 14). The actual complaint of Petitioner Comptroller is that he will be required to consider state branching laws and, occasionally perhaps, even consult with state banking authorities regarding the establishment of new branches by national banks. Certainly this has not been the practice of the national Comptroller in recent years, and, to that extent, requires a change in the administration of the federal branching act. However, there is no reason why such a

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an agricultural state, Congress wisely adopted state standards to determine the conditions upon which national banks may establish and operate branch banks. With diffusion of regulatory authority among the 50 states, more freedom in the economy is assured than would be the case with a monolithic standard of banking. At the same time, no substantial privilege is given to banks in one system over those in another while competing in the same geographical area.

practice should be considered "unacceptable." On the contrary, it seems apparent that this is the only way in which there can be coordination of state and federal banking authorities so that competitive equality can be maintained in the branching area. *National Bank* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958).

B. The decision of the Court of Appeals is consistent with other decisions.

Petitioner Comptroller states that the decision sought to be reviewed conflicts with "the approach" taken by the Court of Appeals for the Ninth Circuit and the District of Columbia (Pet. at 9). Respondents submit that the cited cases involved completely different factual issues.[8] Further, there is no conflict whatsoever in principle.

In each of the cited cases, the issue was whether one bank was in fact doing business through the ostensible operation of another bank. If so, there was no dispute that the operation constituted an illegal branch bank. In *Camden Trust Co.* v. *Gidney*, 301 F.2d 521 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886 (1962), one national bank established a new bank as an affiliate. *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd*, 379 U.S. 411 (1965) and *First National Bank* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962), both involved operations of bank holding companies.

In *Camden* and *First Bank Stock Corp.*, there were separate banks involved with affiliated stock ownership

8. The question of whether the definition of branch contained in 12 U.S.C. §36(f) is exclusive or partial was not raised or determined in any of the above-cited decisions. However, the Court of Appeals for the District of Columbia recently utilized precisely the same approach as the Court of Appeals below in constructing the definition of state banks contained in 12 U.S.C. §36(h). *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967).

and, accordingly, no branching.[9] In *Whitney*, the Court of Appeals found that the old bank intended to do business through the facade of the new bank (both of which were to be owned by the same holding company), and that the new bank was in actuality a branch.[10] Although reaching different results, the courts of appeals for both circuits agreed that the corporate veil should be pierced whenever one bank is doing business through the other. The refusal of the court below to condone "paper evasions" of state branching law, which, by Congressional mandate, is federal branching law, is certainly consistent with this approach.

Petitioner Comptroller also contends that the decision below conflicts with the *Walker Bank* case. In this connection, Petitioner Comptroller asserts that the Court below held that the "definition of 'branch' in 12 U.S.C. 36(f) is rendered superfluous by state law concepts." (Pet. at 10). It is further stated that the Court below held that "Congress has remitted to the states the threshold question of defining the class of activities as to which there is to be 'competitive equality.'" (Pet. at 10-11). As previously noted, however, the Court of Appeals did *not* so hold. The Court below unmistakably held that section 36(f) controls *exclusively* the threshold determination of what activities constitute branching. Only if the activity is a "branch" within the meaning of section 36(f) does state law ever come into play. Thus, Petitioner Comptroller's assertion

9. The dissenting judge in *Camden* did *not*, as asserted by Petitioner Comptroller (Pet. at 9) state that the operation was defined as branching under state law; he did state, however, that state law prohibited branching and declared that "if substance rather than form is to prevail," the new bank should be held to be an illegal branch. *Id.* at 526.

10. The Supreme Court reversed on procedural grounds under The Bank Holding Company Act (12 U.S.C. §1841 *et seq.*), not the branching law. 379 U.S. 411 (1965).

of a conflict with *Walker Bank* is premised solely on unwarranted statements as to the holding of the Court below.

Petitioner Comptroller further attempts to show a conflict with the cases of *Howell* v. *Citizens First National Bank*, 385 F.2d 528 (3rd Cir. 1967) and *Union Saving Bank* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964), by stating that the Court below accepted the State Comptroller's ruling as the dispositive interpretation of an "unclear" state statute (Pet. at 13). Such an assertion flies directly in the face of the decision itself. Unlike Petitioner Comptroller, the Court of Appeals found Florida Statute §659.06 to be perfectly clear. It declared that "the Florida statute permits only one place of business, and *this direction is uncomplicated, unhedged, and unmodified.*" (App. 35) (Emphasis supplied). Continuing, the Fifth Circuit stated that "unless we were to cast away all concepts of the functional 'business' of a bank, *we would have to conclude that First National was 'doing business' with its extra services.*" (App. 35) (Emphasis supplied). The Court's construction of the statute is consistent with rulings of the State Comptroller. But the Court clearly did not, as stated by Petitioner Comptroller,[11] accept such rulings "as dispositive" without further analysis.

As the Court of Appeals recognized, Florida Statute §659.06 is not complicated. Sub-section (2), *which has been totally ignored by Petitioner Comptroller from the outset*, explicitly states that a bank drive-in or walk-up facility is authorized *only if it is located on the same property as the main banking house or on property contiguous thereto* (A. 1-2). Yet Petitioner Bank's walk-up depository facility is located in a shopping center about a mile away from its building (R. 75). It would seem to be beyond question that the establishment of this off-premises

11. Pet. at 5.

depository facility is in direct contravention of Florida Statute §659.06. Indeed, Petitioners have *never argued* to the contrary. Similarly, the armored car of Petitioner Bank, characterized by Petitioner Bank as "a 'mobile drive-in,'" operates as far as 18 miles away from its main banking house (R. 494-97; Exhibits C-F at R. 2097).

Florida Statute §659.06(1) distinctly provides that the business of a bank is to be performed only at its banking house and authorized drive-in or walk-up facilities (A. 1). Petitioner Comptroller has admitted that the pick-up of deposits and the delivery of currency off-premises constitutes the business of banking (R. 569-70).[12] As such, it is being performed off-premises in clear violation of the provisions of Florida Statute §659.06, and the Court of Appeals correctly so held.

II

The Decision Is Correct on Other Grounds.

The Court of Appeals implicitly held that Petitioner Bank is receiving deposits and cashing checks through its off-premises activities in violation of federal branching law. This holding is amply supported by the evidence and provides an additional ground upon which the decision below can be sustained.

A. Off-premises banking operations such as those performed by Petitioner Bank were intended by Congress to be prohibited as branching unless authorized by state law and the office of the Comptroller of the Currency so ruled prior to 1963.

Petitioner Comptroller states that national banks performed off-premises armored car operations, as well as

12. It is significant that there is an express provision in Florida Statute Section 659.06 authorizing banks to pick-up deposits for school savings plans at the school (A. 1-2). Clearly the Florida Legislature believed that the off-premises pick-up of deposits in any other situation was prohibited by Section 659.06.

other off-premises agency activities, prior to passage of the McFadden Act. It is urged that such activities must therefore not constitute branching since national banks had no power to branch prior to 1927. This contention has no merit. The legislative history of the federal branching act clearly establishes that *such off-premises agency activities were considered by Congress to be branch banking and to be permitted to national banks only if permitted to state banks under state law.*

In 1911, the United States Attorney General ruled that national banks could appoint agents "to receive and collect money and forward it to the bank." 29 Op. Att'y Gen. 81, 90 (1911). Subsequently, in 1924, the United States Supreme Court expressly held that national banks had no legal power to branch bank. *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). However, since the Attorney General's opinion was cited[13] in the *Missouri* decision, the Comptroller of the Currency interpreted that decision as "having application only to branch banks which do a complete banking business, and not to branch banks which only receive deposits and cash checks. . . ." 66 Cong. Rec. 1577 (1925). Accordingly, he continued to permit national banks to operate off-premises offices, agencies, and tellers' windows, even in states prohibiting branch banking. 67 Cong. Rec. 3232 (1926). As a result, the following situation confronted Congress prior to passage of the federal branching statute:

> "There are two conflicting decisions or opinions of the Attorney General, and *the decision of the Supreme Court has left uncertain the question of branches or*

13. A 1923 decision of the Attorney General held that national banks could establish off-premises offices for the performance of routine services such as the receipt of deposits and cashing checks. This opinion was partially disapproved by the United States Supreme Court in the *Missouri* case.

'financial comfort stations,' authorized by [Comptroller] Crissinger (laughter). Now the committee agrees that whatever may be our solution of it, . . . Congress should by affirmative action decide what are the rights of national banks to engage in branch banking." Representative Wingo, 66 Cong. Rec. 1777 (1925). (Emphasis supplied).

The legality of all of such off-premises activities was severely questioned by Congress.[14] Representative Nelson flatly declared that "branch banks, 'additional offices' or 'agencies,' or whatever may be the form of the transgression, when put to the test of the *Missouri* case, are clearly illegal." 67 Cong. Rec. 2841 (1926). Similarly, Representative Stevenson emphasized that, although there were existing branches of national banks "established by the dictum of the Comptroller of the Currency, *who has assumed to say that he can allow a national bank to establish as many agencies for receiving deposits and paying checks as he sees fit,*" this form of branching was cut out "root and branch" in the bill. 66 Cong. Rec. 1627 (1925) (Emphasis supplied).

Specifically included in the federal definition of a branch is any *agency* where "deposits are received, checks paid, or money lent." And, the legislative debates establish that Congress *fully intended to thereby limit the receiving of deposits or cashing of checks off-premises through the agency device.* Thus, there is no support for the assertion that Congress intended to draw a distinction in the McFadden Act between branch banking and the establishment of agencies to receive deposits and cash checks off-premises.

---

14. See, for instance, 65 Cong. Rec. 11298 (1924); 66 Cong. Rec. 4410, 1577-78, 1632, 1779 (1925); 67 Cong. Rec. 3230, 3241 (1926).

Petitioner Comptroller further states, however, that national banks have long been performing armored car operations and that such off-premises bank operations have not been considered branch banking (Pet. at 12). *Written rulings of the office of the Comptroller of the Currency are directly to the contrary.* Until December, 1963, the National Comptroller ruled on numerous occasions that armored car operations exactly like those performed by Petitioner Bank herein constituted illegal branch banking[15] (R. 143-519). It was not until late 1963 that Comptroller of the Currency James J. Saxon ruled there was no violation of the federal branching act so long as the national bank utilized a contract stating that it was acting as agent for its customer.

B. Petitioner Bank is receiving deposits and cashing checks at its off-premises facilities.

Petitioner Comptroller states, without further discussion, that "the district court's finding that First National's activities do not constitute 'branching' is well-supported."[16] (Pet. at 15). Respondents submit that the Court of Appeals properly rejected the District Court's finding that Petitioner Bank is not branching. Recognizing that Petitioner Bank's use of the so-called "agency" and "de-

15. See, for example, letter rulings at R. 1466-67, 1477, which are set forth at pages 5-7 of the Appendix to Respondents' Brief in Opposition to the Petition for Certiorari filed by The First National Bank in Plant City [No. 777, this term].

16. Respondents believe it is important to recognize that the District Court rendered that holding in the face of its own finding that Petitioner Bank was cashing checks off-premises (App. 47). Moreover, the District Court's finding that the bank was not receiving deposits off-premises was premised on its ruling that the documents used by Petitioner Bank *conclusively established* as a matter of law that it was acting as agent for its customers (App. 44). Further, the District Court entered its summary judgment on the basis of limited and conflicting evidence of only five customers selected by Petitioner Bank (R. 986-91). Each of these matters was urged as error on appeal to the Fifth Circuit.

posits" forms is purely a device to evade the federal branching statute, the Court expressly refused to "aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language." (App. 32). Certainly the evidence establishes that Petitioner Bank is in fact receiving deposits and cashing checks at its off-premises bank facilities.

Petitioner Bank delivers currency from the bank to the premises of its customers by means of the armored car. When a check is given to the bank employee in exchange for the currency delivered to the customer, that check is cashed off-premises. *The District Court so found*[17] (App. 47). The fact that Petitioner Bank is cashing checks at its off-premises armored car renders the operation an illegal branch facility in direct contravention of section 36(f).

Petitioner Bank also receives deposits at its off-premises armored car and off-premises depository. It is contended, however, that the bank is not thereby branching because it uses deposit forms which state that the deposits are not *accepted* as such until they reach the banking house. In *State Chartered Banks* v. *Peoples National Bank*, 291 F. Supp. 180 (D.C. Wash. 1966), the District Court rejected a similar argument. The national Comptroller argued there that the national bank was not branching because "only a part" of the check-cashing process would be carried out at the branch facility. The District Court found that a branching facility did exist, however, because the *func-*

17. Nevertheless, the Court held that the armored car operations of Petitioner Bank are legally authorized since they are performed "in substantial compliance" with rulings of the office of the Comptroller of the Currency (App. 47). Accordingly, Respondent Comptroller of the State of Florida was enjoined from interfering with *any* part of the armored car operations (App. 51), *including that part found to be illegal branch banking by the District Court.*

tional act of check cashing was complete after *receipt* of the check and *payment* of the money.

It is significant that the Court of Appeals below stated that it subscribed to the *State Chartered Banks* decision "without hesitation" because the same situation is present here (App. 32). The *functional act* of *receiving deposits* is completed off-premises. Although some bookkeeping remains to be done at the bank, Petitioner Bank accepts *possession* of and *responsibility* for the deposits off-premises. Nothing remains for the depositor to do to complete the deposit.

The statement in the bank forms of Petitioner Bank that the bank deposits are *not* accepted as such until they reach the banking house is irrelevant to the question of whether the off-premises operation is branching. Section 36(f) expressly refers to the *receipt* of deposits and *not* the technical *acceptance* of monies as deposits.

Further, regardless of the "agency" forms, the evidence establishes that Petitioner Bank is not in fact acting as agent for its customers when it receives deposits and cashes checks off-premises. An agency relation does not exist merely because the parties designated their relationship as such, but only if the requisite factual characteristics are present. Restatement (Second) of Agency §1 at 8 (1957); *Bartels* v. *Birmingham*, 332 U.S. 126 (1947).

The term "agency" always imports dealings between two parties through the medium of one who has the power to bring about business relations between his principal and third persons. Petitioner Bank is not acting on behalf of its customers in matters involving third parties but, instead, solely in matters involving the bank itself. Control of the principal over the activities of his agent is another requisite factor in the principal-agent relationship. Yet

the customers of Petitioner Bank have *no* control over the armored car or the bank employees with regard to the performance of the off-premises banking transactions (R. 64-66). The primary obligation of the agent is to act for the benefit of the principal, but Petitioner Bank and its employees are *not* primarily obligated to act for the benefit of the customer. Thus, none of the factors of a true agency relationship are present in the instant case.

Although a bank and its customer have the legal right to make their own contract or arrangement, it is well-established that they may not simply "contract around statutory prohibitions or public policy." 10 Am.Jur.2d *Banks* §338 (1963). The contracts herein are entered into for the single, admitted purpose of evading the provisions of the federal branching statute. Respondents respectfully submit that the Court of Appeals properly refused to permit evasion of long-standing federal branching laws and federal policy of competitive equality between national and state banks in the matter of branching through such subterfuges.

C. There is no paramount federal law authorizing the off-premises banking operations of Petitioner Bank.

This Court has long held that state law generally operates upon the activities of national banks except when it conflicts with federal law. *McClellan* v. *Chipman*, 164 U.S. 347 (1896). Even assuming that the off-premises banking activities of Petitioner Bank are not within the definition of section 36(f), Respondents submit that Florida law prohibiting such operations is still "operable and controlling" because there is no paramount federal law authorizing such activities.[18] There is no express power under

18. Respondents sought to raise this matter in the District Court but that Court refused to rule upon it, stating that it was neither appropriate nor necessary to do so (App. 50). The Circuit

federal law. There can be no implied power under 12 U.S.C. §24 (seventh) (A. 2) since this Court has expressly held that "the mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business. . . ." *First National Bank* v. *Missouri*, 263 U.S. 640, 659 (1924). Respondents respectfully submit that the decision of the Court of Appeals can also be sustained for this reason.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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By .....
WM. REECE SMITH, JR.

Court did not pass on the question because of its conclusions on other issues. Likewise, the Circuit Court did not pass on various issues regarding the propriety of the summary judgment entered by the District Court and the severe limitations placed upon Respondents' discovery efforts.

APPENDIX

A. STATUTES

FLORIDA STATUTE § 659.06

659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main

banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

TITLE 12, UNITED STATES CODE § 24 (SEVENTH)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . .

A3

January 21, 1969

Mr. Robert N. DuRant, Executive V-President
South Carolina Bankers Association
300 Columbia Building
Post Office Box 11299
Columbia, South Carolina 29211

Dear Mr. DuRant:

This is in reply to your letter of January 20, in which you request a copy of this Department's ruling on the legality of the establishment of loan production offices in this State by out-of-State banks pursuant to the interpretation announced by the Federal Reserve Board on August 14, 1968.

We are pleased to enclose a copy of our correspondence relating to the ruling by this Department that the establishment of loan production offices in this State for the purpose of conducting a banking business by out-of-State banks would be illegal.

This Department takes the position that loan production offices established for the purpose of performing any and all banking functions normally conducted by the parent bank with the exception of issuing checks would constitute a banking business, and as such, would be considered as a branch office.

Therefore, under the laws of Georgia, out-of-State banks would be prohibited from establishing such offices in this State and local State and national banks would be compelled to conform with the branch banking laws of the State (13.203.1 and 13-204.1 of the Code of Georgia) as they apply to branching.

Yours very truly,

W. M. Jackson
Superintendent of Banks

Enclosure
WMJ/mb

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief and Appendix was furnished, on behalf of Respondents Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, by air mail, postage prepaid, this ..... day of ....., 1969, to Robert S. Edwards, Esquire, Post Office Box 1119, Plant City, Florida 33566, Attorney for Petitioner The First National Bank in Plant City, and to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, Attorney for Petitioner William B. Camp, Comptroller of the Currency.

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 777

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

MOTION FOR LEAVE TO FILE A BRIEF FOR The First National Bank of Cornelia, Georgia, et al. AS AMICI CURIAE In Support of Petitions for Writs of Certiorari

---

The following national banks hereby respectfully move for leave to file a brief as Amici Curiae in the above-entitled cases in support of the petitions for writs of certiorari already filed by the First National Bank in Plant City, Plant City, Florida, in No. 777

and by the Solicitor General of the United States on behalf of William B. Camp, Comptroller of the Currency of the United States, in No. 932:

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THE FIRST NATIONAL BANK OF CORNELIA
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Counsel for Petitioners have consented to the filing of the attached brief. The consent of Counsel for Fred O. Dickinson, Jr., Comptroller of the State of Florida, and of Counsel for the intervening state banks, Respondents in both cases, was requested but refused.

The interests of Amici and their reasons for requesting leave to file a brief are set forth in the attached brief.

This Motion and Brief are filed at a late date (though prior to the filing of Respondents' Briefs in Opposition) for two reasons. First, some of the developments upon which this Brief are based did not occur until quite recently. For example, the Solicitor General did not file his Petition in No. 932 until January 10, 1969; Mr. Justice Black did not stay the order in the *Bank of Cornelia* case, *infra*, until December 16, 1968; and the ruling of the Attorney General of North Carolina, referred to *infra,* was not rendered until December 23, 1968. Secondly, it has taken a substantial amount of time for these various actions and rulings to be circulated to the 22 Amici, for this Brief to be prepared, and for concurrence to be obtained from the Amici, located in all parts of the country.

Respectfully submitted,

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BRIEF ON BEHALF OF

The First National Bank of Cornelia, Georgia, et al.

AS AMICI CURIAE

In Support of Petitions for Writs of Certiorari

QUESTION PRESENTED

(as stated by the Solicitor General)

Whether, for purposes of the reference in 12 U.S.C. 36(c) to state law as controlling the permissibility of a national bank "branch", the statutory scheme, in-

cluding the definition of "branch" in 12 U.S.C. 36(f), permits state rules also to control the threshold determination of what banking activities constitute a "branch".

INTEREST OF AMICI CURIAE

All 22 Amici Curiae joining in this brief are national banks. Their home offices are located in 17 states. Some operate branches—as many as 117 different offices—and some do not. All carry on activities which either already have been or could possibly be affected by the ruling in *Dickinson* or by a logical extension of that ruling by state Banking Commissioners in the various states. In fact, as shown in the "Reasons for Granting the Writs" below, state officials, relying on *Dickinson,* have already challenged national bank activities in several states affecting some of the Amici banks. All of the Amici Curiae, therefore, have an immediate and direct interest in this Court's review of the *Dickinson* decision and in a reversal of the Fifth Circuit's judgment and decision in that case.

The Amici Curiae national banks joining in this brief are the following:

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151 West Fort Street
Detroit, Michigan 48226

NATIONAL BANK OF DETROIT
611 Woodward Avenue
Detroit, Michigan 48232

NORTH CAROLINA NATIONAL BANK
200 South Tryon Street
Charlotte, North Carolina

PEOPLES FIRST NATIONAL BANK
Miami Shores, Florida

THE CHASE MANHATTAN BANK
(NATIONAL ASSOCIATION)
1 Chase Manhattan Plaza
New York, New York 10015

THE FIRST NATIONAL BANK OF CHICAGO
38 South Dearborn Street
Chicago, Illinois

THE FIRST NATIONAL BANK OF CORNELIA
119 South Main Street
Cornelia, Georgia

THE HOWARD NATIONAL BANK AND TRUST COMPANY
111 Main Street
Burlington, Vermont 05401

THE INDIAN HEAD NATIONAL BANK OF NASHUA
146 Main Street
Nashua, New Hampshire 03060

THE STATE NATIONAL BANK OF CONNECTICUT
2834 Fairfield Avenue
Bridgeport, Connecticut 06605

VIRGINIA NATIONAL BANK
One Commercial Place
Norfolk, Virginia

WESTERN PENNSYLVANIA NATIONAL BANK
435 Smithfield Street
Pittsburgh, Pennsylvania 15222

STATEMENT

The Amici Curiae agree with and incorporate herein the Statements of the Petitioners in Nos. 777 and 932.

REASONS FOR GRANTING THE WRITS

The Amici banks entirely agree with and support the reasons for granting the writs already advanced by Petitioners. It is the position of the Amici, however, that both petitions failed to acquaint the Court with certain recent developments in the administration of the banking laws of the various states which have already grown out of the *Dickinson* case, and also failed

to emphasize the great disparity in state banking laws and practices which, if *Dickinson* is allowed to stand, could become incorporated into federal law and disrupt the operation of national banks across the country.

Neither petition, for example, mentioned the recent case of *Jackson* v. *First National Bank of Cornelia, Georgia,* N. D. Ga., Cir. No. 1191 (October 21, 1968), in which the District Court relied entirely on the *Dickinson* opinion. The suit was filed by the Superintendent of Banks of the State of Georgia and a number of intervening state banks, seeking to enjoin the First National Bank of Cornelia, Georgia, from operating an armored car bank messenger service in parts of Georgia and North Carolina. The complaint alleged that this service constituted illegal mobile branch banking under 12 U.S.C. §§ 24 (Seventh), 36(c), (f), and Title 13 of the Code of Georgia, § 201 *et seq.* The bank answered and counterclaimed for an injunction and declaratory judgment. The Comptroller of the Currency of the United States intervened as a defendant in support of the bank. Following a hearing, the District Court made findings of fact and permanently enjoined the bank from engaging in its armored car bank messenger service, even if the service is carried out under an agreement providing that the armored car messenger is the agent of the customer and not of the bank. On December 16, 1968, Mr. Justice Black stayed the District Court's order pending final disposition of the instant case. Similarly, the Fifth Circuit has deferred all further appeal proceedings in its own court in the *Bank of Cornelia* case until *Dickinson* has been resolved.

The District Court in *Bank of Cornelia* held that the purpose of 12 U.S.C. § 36(c) is to place national

and state banks on a basis of "competitive equality," and that this "is accomplished by adopting, in full, the state branch banking law as federal law in the various states." Branch banks are defined by Georgia law as "any additional place of business of any parent bank not located within the particular city * * * where its parent bank was chartered". Ga. Code § 13-201.1 (b). Georgia law prohibits the establishment of any new or additional branch bank anywhere in the State after February 9, 1960. Ga. Code § 13-203(c). In addition, a parent bank in Georgia may operate only one additional bank office or facility within the particular city where the parent bank is situated if that city has a population not exceeding 40,000. Ga. Code § 13-203.1. These provisions of the Georgia law were incorporated into "federal law" by the District Court, relying specifically upon *Dickinson*.

The District Court held that it must accept the position of the Georgia Superintendent of Banks, because "there is no decision of the Georgia Supreme Court contrary to this interpretation * * *." Thus, the District Court concluded that the Bank of Cornelia's armored car bank messenger service was illegal because it constituted not only branch banking prohibited by Georgia law but also the carrying on of a banking business through banking facilities other than on the premises of the bank's place of business, also prohibited by Georgia law.

The effect of this decision, if allowed to stand by a denial of certiorari or an affirmance in *Dickinson*, would be to bar for all time not only the armored car messenger services of national banks in Georgia but also the expansion of such banks beyond the borders

of their immediate cities. Further, the extent of the ruling is demonstrated by the response of the District Court to the following remarks made during oral argument:

> It's undisputed in the record here that Georgia banks can and do conduct many off-premises activities: officer call programs at a place of business to solicit loans and deposits; calls on new customers; trust representatives calling off-premises on potential or existing trust customers; participation in loan closings, again off-premises; visits to and assisting sometimes in the management with or of correspondent banks; foreign branches overseas conducted by both State and National Banks, or participation in corporations organized under the Edge Act to conduct foreign banks; credit cards. [Transcript of Sept. 26, 1968 hearing, pp. 12-13.]

The Court's response was that the Georgia Superintendent, under the *Dickinson* decision, could declare each of these activities by national banks to be illegal. *Id.* at 18. Thus, *every* off-premises activity by a national bank is now subject to attack by state commissioners, if the *Dickinson* and *Bank of Cornelia* decisions become binding law. The chaos that may well result can hardly be overstated.

As a matter of fact, the impact of the *Bank of Cornelia* decision even on the communities served by the Bank's armored car service would be devastating. As shown by the District Court's findings, the Bank's three armored trucks make 1,415 different calls on 505 separate customers every week. This service has been provided for more than two years. The trucks pick up cash and checks for the purpose of transporting them to the bank, carry small bills and coins for

changing larger bills, transport cash to certain customers, and provide a payroll cashing service to a number of customers. Of the ten counties covered by this armored truck service, every one is located in Appalachia, recognized by the Government as one of the most destitute sections of the United States. The hundreds of businesses served by these trucks are almost exclusively small ones, and most are located in rural or mountain areas from five to twenty miles away from the nearest town and the nearest bank. Thus, personal deliveries of money to and from the bank would be not only difficult but extremely hazardous.

As in the instant case, the Bank of Cornelia's armored car messenger service has been operated pursuant to a specific ruling by the Comptroller of the Currency of the United States to the effect that such a service is legal so long as an agreement between the bank and its customers specifies that the messenger is the agent of the customer (Comptroller's Manual, par. 7490). The District Court found that such agreements have been in effect between the bank and its customers. Nevertheless, the service was outlawed pursuant to the *Dickinson* ruling.

Recent developments in other states demonstrate that the situation in Florida and Georgia is not unique to those states and that the trend begun there may well accelerate if *Dickinson* is allowed to stand. Thus, the Attorney General of North Carolina, specifically citing *Dickinson,* has recently ruled that loan production offices constitute branch banking within the North Carolina statute.[1] Using the example of an

[1] These loan production offices have recently been specifically approved for national banks. 33 F.R. 11812 (August 14, 1968).

automobile dealer who relays the loan application information to the bank, which must then approve the loan, the Commissioner has written: " * * * it is my opinion that the automobile dealer is acting as the agent for the bank and the bank is in fact making a loan at the automobile dealer's place of business. In my opinion such course of dealing constitutes carrying on the business of banking at the automobile dealer's place of business and, therfeore, would be an unauthorized engaging in the banking business at the location in question unless the bank was authorized to conduct a branch bank at such location." Letter dated December 23, 1968, to Mr. Frank L. Harrelson, Commissioner of Banks.

Using this reasoning, even an independent armored car operation, such as Brinks, could be outlawed in some states under the *Dickinson* decision if it operated under contract with a bank, as of course it must if it is to transport the bank's funds.[2]

In fact, under the North Carolina interpretation, as under the District Court's comments in the *Bank of Cornelia* case, virtually any off-premises activities could be enjoined as unauthorized branching. The seriousness of such a development can be gauged by an examination of typical activities by a national bank in the state, Amicus North Carolina National Bank. That bank is part of the BankAmericard credit card operation; finances new cars through automobile dealers; closes loans off premises; solicits new businesses, loans, deposits and trust accounts away from its office, and engages in a number of correspondent bank activities. Similarly, Amicus The Union National Bank of North

[2] By way of example, Amicus Manufacturers National Bank of Detroit uses Brinks, and Amicus The State National Bank of Connecticut uses Federal Amored Car Service of Bridgeport.

Carolina operates a charge card plan; sells data processing services, and carries on a courier service to pick up cash letters and data processing work for correspondent banks in a several-state area and for nonbank customers who use the bank's data processing services for payroll, billing, and other record maintenance.[3]

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[3] Off-premises activities are not restricted to any one section of the country. Thus, Amicus Canal National Bank, Portland, Maine, engages in a number of such activities which might possibly come under the *Dickinson* rationale: money order sales through bank customers (savings banks and retailers); the use of Post Office lock box arrangements; procedures by which trust officers pick up securities at the customer's residence or elsewhere when a trust is being established; the signing of loan agreements, contracts, and trust agreements in law offices and business offices; the use and activities of collectors (bank employees) for the bank's installment loan division, and all outside solicitations. In addition, the bank is considering the purchase and use of automatic deposit machines to be placed in strategic retail locations, and "in-plant" banking, both of which have come under interdiction in other jurisdictions.

New York law provides:

> No bank or trust company or officer, director, agent or employee thereof, shall transact any part of its usual business of banking except * * * [at its principal office and authorized branches. N. Y. Bank. Law § 105(1).]

While the phrase, "usual business of banking," has not to our knowledge been interpreted by either the New York courts or the New York banking authorities, it is possible that any of the following activities normally carried on by many New York banks (in addition to offsite depositories and the armored car and messenger services involved in *Dickinson*) might be challenged if conducted by a bank at a non-branch location: loan solicitation and servicing (including the servicing of mortgage loans made by other banks or financial institutions), factoring, equipment leasing, mortgage warehousing, data processing, accounting and bookkeeping services, sale of travelers' checks and money orders and solicitation of bank credit card customers. In regard to the sale of traveler's checks by agents of a bank, see *Bank of America* v. *Lima*, 103 F. Supp. 916 (D. Mass. 1952).

As in North Carolina, both the Banking Commissioner and the Attorney General of Illinois have recently ruled that all off-premises activities of banks are prohibited by the Illinois Banking Act (as revised 1968), 16½ § 106.[4] Specifically, they have outlawed any mechanical device, such as a "Lectro-Teller," in which checks and funds are placed by bank customers for delivery to the bank, and which are located at places other than the bank pursuant to an agreement between the customer and the bank.[5] In the same opinions, they also outlawed loan production offices, which they described as offices apart from the main bank where preliminaries for loans are conducted with prospective borrowers. This ruling was made even though "the finalization of loans so initiated occurs at the main bank * * *." In his letter of September 26, the Commissioner specifically cited and relied on the Fifth Circuit's *Dickinson* decision.

Similar loan production offices, where a car or appliance dealer makes a loan to a customer on behalf of the bank, are maintained by a number of the Amicus banks, including the Virginia National Bank. And Amicus First National Bank of Arizona has some 50 "Lectro-Tellers" distributed in supermarkets, drug stores and the enclosed malls of four regional shopping centers. In these same malls, it also has night-drop

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[4] This section provides: "No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business."

[5] Commissioner's letters of September 26, 1968, and November 26, 1968, to all Illinois banks; Attorney General's letter to the Commissioner dated November 22, 1968 (File No. UP-2023).

facilities. In both instances the facilities are operated by Atlas Services under contract with the bank, but if the North Carolina Attorney General's opinion is valid, the operator of a service could, under the laws of some states, be deemed merely the agent of the bank, so that the service could be converted from an independent operation into branch banking. Yet "deposit machines" have been specifically authorized for national banks by par. 7491 of the Comptroller's Manual for National Banks.

In a letter dated December 21, 1959, the Attorney General of Michigan wrote the Banking Commissioner his opinion (No. 3464) that a mobile banking service, which moved from location to location in order to better service the bank's customers, was clearly a branch banking operation which would violate Michigan's requirement of a stationary banking operation. Opinions, Attorney General, Vol. 1, 1959-60, p. 238. On the other hand, a state bank in Pittsville, Massachusetts—the City Savings Bank—has been given permission by the state Commissioner to operate just such a mobile bank.[6]

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[6] As mentioned above, a number of banks maintain data processing centers and administrative offices off premises. Many larger banks now do most of their data processing and paper work at administrative buildings which are not connected with a certified main office or branch. Customers may or may not visit these offices, depending on the bank. Thus, the national bank involved in *Wingate* v. *Industrial National Bank of Rhode Island*, 1st Cir., No. 7186, docketed August 23, 1968, where plaintiff is challenging the right of a national bank to offer data processing services to other banks and bank customers, has established a $5 million underground, bomb-proof, computer center in the suburbs of Providence, about ten miles from the bank's main office. Other illustrations are the Bank of America, located in California, which for years maintained representative offices in

As to national credit cards, the Court can imagine the extraordinary confusion that would result if these operations were treated as branching under the various state statutes—prohibited entirely in some states and allowed under completely varying conditions in all the others.

Still another state that graphically illustrates the danger of the *Dickinson* rationale is Texas. Both the Texas Constitution (Art. XVI, § 16)[7] and a Texas statute (Texas Banking Code of 1943, as amended, Title 16, Art. 342-903) prohibit branch banking. The constitutional provision has been broadly interpreted in a 38-page letter from the State Attorney General to the State Banking Board (August 18, 1952) as reaching many more activities than "technical branch banking" (p. 9). He ruled, for example, that "chain and group banking are just as violative of the Texas Constitution as branch banking" (p. 11), and that the constitutional provision "was intended to effectuate a State policy requiring that each banking corporation operate as an independent unit" (p. 36).[8] Therefore,

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New York, Chicago, and Washington, D. C.; and Riggs National Bank of Washington, D. C., which once maintained its entire trust department in a separate building. Even more importantly, virtually all money-center banks now have offices the primary function of which is to travel and solicit new business or service existing business from major national corporations.

[7] "Such body corporate [with banking and discounting privileges] shall not be authorized to engage in business at more than one place which shall be designated in its charter."

[8] This ruling is squarely contrary to the holding of the federal courts that chain banking is not impermissible branching insofar as national banks are concerned. *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (9th Cir. 1962); *Camden Trust Co.* v. *Gidney*, 112 U.S. App. D.C. 197, 301 F. 2d 521, *cert. denied*, 369 U.S. 886 (1962).

it violated the Constitution for one bank to organize separate corporate bodies and then dominate or control them "to the extent of indirectly engaging in banking business through another ostensibly independent bank" (p. 36).[9] When this interpretation is correlated with the *Dickinson* decision, it is clear that a state Banking Commissioner could, by departmental order as distinguished from legislative fiat, prohibit a registered bank holding company from owning interests in more than one bank. This would defeat the Congressional intent and seriously jeopardize the authority of federal control over registered bank holding companies.

The disparity in treatment that could ensue is also illustrated by the fact that while local commissions interpret state laws in Florida and Georgia as prohibiting the operation of armored car services by banks, California law *compels* the use of such services to and from certain depositors.

Thus, Section 53739 of the California Government Code reads: "*Expense of Transporting Money.* The depositary shall bear the expenses of transportation of money to and from the depository." Section 53630(b) provides: "(b) 'Depository' means bank in which the moneys of a local agency are deposited.'" And Section 53630(a) reads: "(a) 'Local agency' means county, city, municipality, or other public or municipal corporation." Under these sections, it becomes mandatory for banks to provide armed car service for the

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[9] See also letter from the Attorney General of Texas to the Banking Commissioner (Opinion No. WW-159) dated July 3, 1957, and *Texas ex rel. Falkner* v. *National Bank of Commerce*, 290 F. 2d 229 (5th Cir.), *cert. denied*, 368 U.S. 832 (1961).

transportation of money to and from the offices of the local agencies defined in the statute.[10]

It must be emphasized that even disregarding the varying interpretations of branch banking that have been or may be rendered by state officials, the fact is that state statutes themselves vary drastically in their treatment of the subject. As pointed out above, some states, like Florida, Georgia, Texas and Illinois, prohibit branch banking altogether. Others allow branches but have disparate requirements in establishing a branch.

For example, Connecticut allows branches, with the approval of the state Commissioner, to be operated by a bank (with a combined capital and surplus of at least $1,000,000) within the same town as the main office or within other towns where no state or national banks are located, assuming a number of conditions are met. Conn. Gen. Stat. (as amended), § 36-59. Michigan allows branches generally within the same city as the main office or within a city or village in the same or a contiguous county not more than 25 miles from the principal office. *Compiled Laws of Mich.* of 1948 (as amended), §§ 487.34, 487.34a, 487.34b. New Hampshire allows branches to be established by a bank (with no restrictions on the amount of capital), after a public hearing, in the same town as the principal office, in any contiguous town with no other banks, and in any non-contiguous town within 15 miles of the principal office if no other bank is within 10 miles of the proposed branch. N.H. Stat. §§ 384-8:1, 384.B:2.

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[10] Amicus Bank of America National Trust and Savings Association, pursuant to these sections, regularly provides armored car messenger service to and from these local agencies.

The Code of Vermont, on the other hand, allows a bank, with no restriction on capital, to establish branches after a public hearing if the branches will "promote the general good of the state," so long as they do not have certain anti-competitive effects, harm depositors, etc. Vt. Code Title 8, §§ 501-601a. The Massachusetts statute limits branches to a single county. Mass. Gen. Laws, Ch. 172 § 11.

The number of branches operated by any one bank—and therefor the complexity of the problem—also vary widely from bank to bank. Among the Amicus banks, for example, First Union National Bank of North Carolina has 117 offices in 58 communities in North Carolina; National Bank of Detroit operates 100 banking offices, including one in London, England; The State National Bank of Connecticut has 35 full-service offices located in 21 communities and a separate Computer Center in Fairfield; Howard National Bank and Trust Company has 13 banking offices in Vermont; Indian Head National Bank has one main office and two branches, all in New Hampshire; whereas Continental National Bank of Fort Worth and First Security National Bank of Beaumont each has only one office. Most banks serve only one state, but Exchange National Bank of Chicago, by way of example, operates four offices that cover six states, so that the laws of *each* state as to what constitutes banking would come into play.

The Amicus banks stress to the Court that these varying activities, practices, statutes and interpretations spell nothing but trouble in the administration of federal banking laws throughout the country. As pointed out by the Solicitor General, "It is inconceivable that, without expressly so providing, Congress

could have intended that the lawfulness of all these functions [performed by banks] turn on state definitions of 'branch' " (Petition, p. 12).

It was well settled, at least until the *Dickinson* opinion, that the National Bank Act constituted "* * * by itself a complete system for the establishment and government of national banks * * *." *Cook County National Bank* v. *United States,* 107 U.S. 445, 448 (1883). Thus, the determination of what is a "ratable" distribution of the assets of an insolvent national bank under 12 U.S.C. § 194 is "one of federal law." *American Surety Co.* v. *Bethlehem National Bank,* 314 U.S. 314, 316 (1941); see also *D'Oench, Durme & Co., Inc.* v. *FDIC,* 315 U.S. 447 (1942). And in *Downey* v. *City of Yonkers,* 106 F.2d 69, 73 (2d Cir. 1939), *aff'd,* 309 U.S. 590 (1940), the court held: "It is well settled that the distribution of assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded." When a policy is involved upon which Congress has legislated, the validity of a note given to a national bank to purchase stock, "* * * though left by the statute to judicial determination * * * involves decision of a federal, not a state question." *Deitrick* v. *Greaney,* 309 U.S. 190, 201 (1940). Of particular significance is Judge Learned Hand's opinion for the Court in *FDIC* v. *Tremaine,* 133 F.2d 827 (2d Cir. 1943). The opinion states that in 1930,

> * * * avowedly in order to enable national banks to compete with state banks for the deposit of the "public money" of the states in which they did business—§ 90 was amended by providing that a national bank might also, "upon the deposit with

> it of public money of a State or any political subdivision thereof, give security * * * of the same kind as is authorized by the law of the State * * * in the case of other banking institutions in the State. [133 F.2d at 828-829.]

Notwithstanding that the statute involved was enacted "* * * to enable national banks to compete with state banks * * *," and notwithstanding that the question was what constituted "public money" of a state or political subdivision thereof, the court held that:

> that phrase was to be determined as a federal question: i.e., that Congress did not mean to make it dependent upon whether the deposits secured were deemed "public money" according to the law of the State where the security was given. [133 F.2d at 829.]

These cases involving the National Bank Act are merely applying familiar doctrine that "* * * a federal statute may not be set at naught, or its benefits denied, by state statutes or common law rules." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). National banking is an area "* * * within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co., supra,* 317 U.S. at 176. In short, words appearing in a federal statute, whether or not having a fixed meaning under state law, must be interpreted according to federal law. *New York* v. *Feiring,* 313 U.S. 283, 285 (1941). *Dickinson* held otherwise.

The petitioner in No. 777 and the Solicitor General in No. 932 noted a number of cases which conflict with

the ruling below. Added to these should be *Rushton* v. *Michigan National Bank*, 208 Mich. 417, 299 N.W. 129 (Sup. Ct. 1941), which held that the state Banking Commissioner need not approve a national bank's branch application.[11]

We respectfully urge the Court to grant certiorari, reverse the Fifth Circuit opinion, and restore the orderly administration of the federal banking laws.

Respectfully submitted,

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[11] It should be noted that the Fifth Circuit decision went off on a matter hardly discussed in argument. Both parties and the Court, prior to the decision, treated the case as one involving the question whether armored car messengers received "deposits" within the meaning of § 36(f). In fact, the reply brief of the Florida Commissioner stated that "* * * the basic decisions regarding branching, *including the definition thereof*, were made by Congress in the 1927 McFadden Act" (p. 15; emphasis in original).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~[illegible]~~ 19

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, *Petitioner*,

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL., *Respondents*.

No. ~~[illegible]~~ 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL., *Respondents*.

OBJECTION BY RESPONDENTS TO MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

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FREE PRESS PUB. CO., INC. - TAMPA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 777

THE FIRST NATIONAL BANK IN PLANT CITY, PLANT CITY, FLORIDA, *Petitioner,*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL., *Respondents.*

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL., *Respondents.*

OBJECTION BY RESPONDENTS TO MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

Respondent Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank, and Peoples Bank of Lakeland, hereby file their Objection to the Motion for Leave to File a Brief for the First National Bank of Cornelia, Georgia, et al., as Amici Curiae in Support of Petitions for Writs of Certiorari, and state their reasons for withholding consent to the aforesaid motion as follows:

1. Movants are a number of national banks. Their interests are adequately represented herein by the Solicitor General, on behalf of Petitioner William B. Camp, Comptroller of the Currency of the United States, and by the Petitioner the First National Bank in Plant City.

2. The motion fails to set forth the interest of amici curiae or any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, as required by Rule 42 of the Rules of the United States Supreme Court. In this connection, the motion simply incorporates the brief which is sought to be filed, so that the brief must first be read in order to determine the propriety of the motion for leave to file the brief. Further, the brief is 19 printed pages, also in violation of Rule 42.

3. The brief on behalf of amici curiae does not raise any new facts or questions of law but instead elaborates on several basic points already presented to this Court by both of the Petitioners in this cause.

4. The brief sought to be filed herein by amici curiae refers to several pending controversies with various state banking commissioners, involving different state branching laws. If movants are permitted to file a brief, inevitably those state banking commissioners will seek leave to file briefs as amicus curiae and present their side of the controversy. If this were permitted, the instant case would be unjustifiably broadened, and undoubtedly delayed.

5. A Petition for a Writ of Certiorari was filed by The First National Bank in Plant City on November 25, 1968. On November 29, 1968, the Comptroller of the Currency filed a motion establishing his intention to similarly file a Petition for a Writ of Certiorari.

Yet the motion herein was not served on Respondents until late Thursday night, February 6, 1969. By the time Respondents were served, their briefs in opposition to the Petitions for Writs of Certiorari had been printed and were in the mail to them for service on Friday, February 7, 1969. Consequently, Respondents would not have an opportunity to prepare, print, and file a responsive brief before the other briefs would be distributed to the Court for its consideration.

Wherefore, Respondents respectfully request this Court to deny the Motion for Leave to File a Brief for The First National Bank of Cornelia, Georgia, et al., as Amici Curiae in Support of Petitions for Writs of Certiorari.

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Respectfully submitted,

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First Ruskin Bank
Peoples Bank
of Lakeland

By _____
WM. REECE SMITH, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished, on behalf of Respondents, Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, by airmail, postage prepaid, this _____ day of _____, 1969, to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and to E. Barrett Prettyman, Jr., Esquire, 815 Connecticut Avenue, N. W., Washington, D. C. 20006, Attorney for Amici Curiae, and by mail, postage prepaid, this _____ day of _____, 1969 to Robert S. Edwards, Esquire, Post Office Box 1119, Plant City, Florida 33566, Attorney for Petitioner, The First National Bank in Plant City.

WM. REECE SMITH, JR.
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First Ruskin Bank
Peoples Bank
of Lakeland

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Nos. ~~777~~ and ~~932~~.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 777.

THE FIRST NATIONAL BANK IN PLANT CITY,
Plant City, Florida, Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

No. 932.

WILLIAM B. CAMP,
Comptroller of the Currency, Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER

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May 9, 1969.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 777.

THE FIRST NATIONAL BANK IN PLANT CITY,
Plant City, Florida, Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

No. 932.

WILLIAM B. CAMP,
Comptroller of the Currency, Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER

The First National Bank in Plant City.

OPINIONS BELOW.

The opinion of the Court of Appeals (A., p. 391) is reported at 400 F. 2d 548. The opinion of the District Court (A., p. 365) is reported at 274 F. Supp. 449.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 12, 1968. By order of December 9, 1968, Mr. Justice Black extended the time for filing a petition for writ of certiorari to and including January 10, 1969 (A., p. 410). The petition was filed on that date, and was granted on February 24, 1969 (A., p. 411).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether a national bank may be precluded by state law from engaging in activities which are authorized by provisions of the National Bank Act, 12 U. S. C. 21, et seq., which do not specifically incorporate state law.

2. Whether activities of a national bank other than those described at 12 U. S. C. 36 (f), and in particular the off-premises messenger and receptacle services conducted by First National Bank may properly be considered branching within the meaning of the National Bank Act.

STATUTES AND REGULATIONS INVOLVED.

The statutes involved are 12 U. S. C. 36 (c) and 36 (f) and section 659.06 (1) (a), Florida Statutes. They are printed in the Statutory Appendix, infra, pp. A-1–A-6. The regulation involved is § 7490 of the Comptroller of the Currency's Manual for National Banks (A., p. 381).

STATEMENT.

Petitioner, The First National Bank in Plant City (hereafter First National), is a national banking association organized and operated pursuant to the National Bank Act, 12 U. S. C. 21, et seq. ("the Act"), with its only office in Plant City, Florida. Pursuant to ruling No. 7490[1] of the Comptroller of the Currency, who is the supervisor of national banks, First National began on October 3, 1966 to offer a messenger service to assist its customers in transporting cash and other items to and from the Bank for deposit or withdrawal. Briefly, the messenger service functions as follows.[2]

First National owns an armored car which is driven by an employee of the Bank. Customers of the bank, primarily those operating commercial establishments, may contract with the bank for regular or occasional pick-up and delivery of funds. Customers using the service must enter into a "Comprehensive Dual Control Contract" (A., p. 91) with the Bank which provides among other things, that the Bank is acting as agent for the customer in transporting the money. In addition, transmittal slips (A., p. 123) which provide that monies picked up by the messenger are not deemed to be deposited until received by tellers at the banking house, accompany each pick-up. The Dual Control Contract and a "debit memo" provide that funds delivered to customers must have already been charged against their accounts before the delivery.

In addition to his schedule of pick-up and delivery at customers' business establishments, the messenger also

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[1] Comptroller's Manual for National Banks, § 7490 (A., p. 381).

[2] The operations are described in more detail in the depositions of William M. Rickert, President of First National (A., pp. 76-112), Charles Futch, Vice President (A., pp. 113-152) and of William C. Meriwether, the Bank's messenger (A., pp. 48-76).

goes daily to a receptacle which First National has constructed at a local shopping center. Items for pick-up by the messenger may be placed in the receptacle together with the same form of transmittal slip used for direct pick-up (or a transmittal envelope incorporating by reference the language of the transmittal slip).

Shortly before inauguration of its messenger service, First National received a letter from the Deputy Commissioner of Banking of the State of Florida[3] advising the Bank that the service was in violation of Section 659.06 (1) (a), Florida Statutes[4] and threatening "legal proceedings" unless the Bank should "cease and desist" from the proposed operation. No reference was made in the letter to the National Bank Act or to the approval by the federal Comptroller.

In order to forestall the threatened "legal proceedings" and to remove the cloud which the State Commissioner had created with respect to the messenger service, First National, on October 7, 1966, brought this action against the Commissioner for declaratory judgment and injunctive relief in the United States District Court for the Northern District of Florida.

The complaint (A., p. 15) asked, *inter alia,* for declaratory judgment that First National was subject to the paramount federal law respecting national banks and that any state law or interpretation of state law must yield when in conflict with the federal declaration of national bank powers. First National also asked the court to declare judgment that its messenger and receptacle services were not in violation of Section 659.06 (1) (a), Florida Statutes. Finally, the complaint sought judgment that

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[3] The letter is reproduced at A., p. 23.

[4] Section 659.06 (1) (a), Florida Statutes, is reproduced in the Statutory Appendix, infra, at p. A-5.

state officials have no authority to supervise national banks and requested an injunction to prevent the State Commissioner from further interfering in the operations of plaintiff's business.

Defendant's answer (A., p. 28) asserted that the Florida statute is made binding on First National by 12 U. S. C. 36 (c) and that the messenger service is also in violation of 12 U. S. C. 81.[5]

Subsequently, three competing state banks intervened on the side of the State Commissioner and the United States Comptroller of the Currency entered the case in support of First National.[6]

Following hearings on numerous motions and the filing of extensive depositions and other evidentiary material, the District Court, on May 6, 1967, granted summary judgment for First National and the federal Comptroller "with respect to the issues raised concerning the application of 12 U. S. C. 36 and 12 U. S. C. 81" (A., p. 375).

In an accompanying Memorandum Decision (A., pp. 365-374) the District Judge ruled that the National Bank Act, at 12 U. S. C. 36 (f), contains an "exclusive defini-

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[5] § 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of Section 36 of this title.

[6] The affidavit of Comptroller William B. Camp in support of his Motion to Intervene asserted that:

"The operation of messenger pickup and receptacle services represents a useful and potentially important aspect of the regular operations of National Banks. This is a practice which has continued over a long period of time and, in my judgment, is of considerable benefit to the banking public as well as to the banks themselves" (A., pp. 160-161).

tion" of the term "branch" insofar as national banks are concerned and that the activities performed through First National's messenger service do not constitute branching within the terms of that definition. The Court found further that the service in question was not "the general banking business" off-premises in violation of 12 U. S. C. 81. With respect to the effect of Florida law in the matter, the Court held that "once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching."

Final judgment, incorporating the Order and Memorandum of May 6, and disposing of several remaining points was entered June 2, 1967.

All defendants appealed and the Court of Appeals, following full briefing and oral argument, reversed the District Court on September 12, 1968.

The opinion of the Court of Appeals did not set aside the District Court's finding that the First National messenger and receptacle services do not involve receiving deposits, paying checks or making loans, the identifying characteristics of a national bank branch as set forth in 12 U. S. C. 36 (f). Instead the Circuit Court observed that:

> "The controlling issue of law in this appeal concerns the district court's choice of law, i. e., that court's failure to consult state law in determining whether First National's activities outside its main offices constitute 'branch banking'" (A., pp. 396-397).

The Court then devoted most of the remainder of its opinion to the argument that in passing on the lawfulness of First National's messenger operation it could properly avoid a decision as to whether the activities fall within

the perimeters of section 36 (f) "and look instead to the laws of Florida" (A., p. 408).

The Court reached this conclusion in partial reliance upon this Court's decision in **First National Bank v. Walker Bank & Trust Co.**, 385 U. S. 252 (1966), which it read as having application beyond the scope of the fact situation which was before the **Walker** court, namely, the degree to which state law govern[illegible] operations of a national bank facility which is admitted as a branch under 12 U. S. C. 36 (f).

Secondly, the Court relied upon and quoted at great length from a decision of a United States District Court in the State of Washington, **State Chartered Banks in Washington v. Peoples National Bank of Washington**, 291 F. Supp. 180 (W. D. Wash., 1966). In so doing, the Court of Appeals below apparently adopted an opinion which is in direct conflict with its own conclusion. The Washington court had held specifically that before a national bank facility could be subjected to the requirements of state law it must be shown to be performing one of the functions set forth at section 36 (f).

The Court below, however, stating that section 36 (f) "is hardly adequate as a definition" (A., p. 406), made no such finding. Instead, the Court merely applied the Florida Statute which permits a bank to have only one place of business, found that First National's messenger service constitutes "doing business" away from its main office and reversed the District Court.

SUMMARY OF ARGUMENT.

I.

Federal Law Controls the Question of Whether First National's Messenger and Receptacle Services Are Lawful.

In order to resolve the original issue raised in this case, the lawfulness of First National's off-premises services, it is first necessary to determine which law is applicable. The federal Comptroller, First National and the District Court believe that federal law, in particular the National Bank Act. 12 U. S. C. 21, et seq., controls. The State Comptroller, the State banks, and the Court of Appeals considered Florida law, in particular section 659.06 (1) (a), to be "operative and controlling" (A., p. 392).

First National submits that the National Bank Act represents a complete statutory plan for the creation, operation and supervision of national banks and that this Court has regularly held that state statutes become applicable to national banks only where Congress has directly or implicitly deferred to state law. The National Bank Act incorporates State statutory law insofar as the operation of bank branches is concerned but no deference to state law is required in connection with national bank off-premises activities which do not constitute branches.

Facilities of national banks which are deemed branches are defined, at 12 U. S. C. 36 (f), as places at which "deposits are received, or checks paid, or money lent." No other standard for determining what is a branch is stated or implied in the National Bank Act and decisions of federal courts and administrators have been consistent in looking only to the section 36 (f) definition in assessing the character of national bank off-premises operations.

The Court of Appeals erred in applying Florida law to First National's messenger service which the District Court had held not to be branching within the meaning of the National Bank Act.

II.

First National's Messenger and Receptacle Services Do Not Constitute Branching Within the Meaning of the National Bank Act.

The District Court considered factual evidence and determined that First National's off-premises activities do not include receiving deposits, making loans or paying checks, the functions which constitute branching under the National Bank Act, and that, consequently, First National's off-premises activities do not constitute branching. The Court of Appeals, because it believed that Florida law and not federal law is "controlling," did not disturb the District Court's decision on this point but simply found the Bank's activities to be "doing business" away from the main office in alleged violation of Florida law. Petitioner submits that the District Court was correct in concluding that, by all standards of commercial law and usage and on the basis of the facts in this case, none of the functions enumerated at Section 36 (f) is performed off-premises by First National. Accordingly, the Court of Appeals erred in finding that First National's operations are unlawful.

ARGUMENT.

I.

Federal Law Controls the Question of Whether First National's Messenger and Receptacle Services Are Lawful.

The threshold question in this case is whether the legality of First National's messenger and receptacle services should be viewed in the context of federal or Florida law. The State Commissioner had argued that the services were, in fact, branches, and, as such, made subject to Florida law by 12 U. S. C. 36 (c). Before there can be a decision as to whether the operations in dispute constitute branch banking, however, the issue of how branching is defined must be settled. This issue inevitably involves a choice of law.

The District Judge stated the issue directly by finding:

> ". . . that once it is established that the activity in question is not a branch within the meaning of federal law there is no occasion for application of state statutes with respect to branching . . ." (A., p. 373).

The District Court then applied federal law and concluded that the activity in question is not a branch within the meaning of federal law and accordingly was not subject to Florida "branching" law.

The Court of Appeals disagreed with the District Court's "choice of law, i. e., that court's failure to consult state law in determining First National's activities outside its main offices constitute branch banking" (A., p. 396). Instead, the Circuit Court concluded "that in this instance Florida law is operative and controlling" (A., p. 392).

Petitioner, First National, believes that the District Court and not the Court of Appeals correctly decided this question.

A. **National Bank operations are subject to state law only to the extent provided by Congress.**

The degree to which the several states may, by legislative or administrative action, affect the operations of national banks has been an issue brought regularly to this Court in the 105 years since passage of the National Bank Act. A number of fundamental premises which have underlain the Court's approach to this question are apparent.

First of all, the Court has always acknowledged that the national banking system is a separate and distinct creature of federal law and that the National Bank Act provides a complete system for the governance of national banks. A clear statement of this operating assumption is found in **Easton v. Iowa**, 188 U. S. 220 (1903), in which the Court found inapplicable to a national bank, a state statute purporting to forbid insolvent national banks from receiving deposits. The Court reversed the Supreme Court of Iowa with these words:

> "We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." 188 U. S. at 229.

The National Bank Act had earlier been characterized by the Court as follows:

> "We consider that Act as constituting by itself a complete system for the establishment and government of national banks . . ."
>
> "Everything essential to the formation of the banks, the issue, security and redemption of their notes, the

winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself . . ."

Cook County National Bank v. United States, 107 U. S. 445, 448 (1883); accord. **Davis v. Elmira Savings Bank,** 161 U. S. 276 (1896).

While making clear that the National Bank Act is pre-eminent in defining the powers and limitations on national bank activities the Court has acknowledged that state statutes may, on occasion, be applicable to national banks. Where, for instance, there is clearly no provision, express or implied, in the federal Act with respect to a specific activity, state legislatures may properly legislate in the area. Thus, in **First National Bank v. Missouri,** 263 U. S. 654 (1924), the Court found that there was nothing in the Act in its form at that time[7] which expressly or impliedly conferred the power to establish branches on national banks. The Court, therefore, found a state law forbidding branching not to be in conflict with the federal statute.

A more recent application of this principle is found in **Franklin National Bank v. New York,** 347 U. S. 373 (1953), where the State of New York sought to enforce against a national bank, a state statute prohibiting, *inter alia,* all banks in New York (other than savings banks) from using the words "saving" or "savings" in their advertising. Citing **Easton v. Iowa** and **Davis v. Elmira Savings Bank** (supra), the Court concluded that:

> "We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances." 347 U. S. at 377-378.

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[7] The decision in the **First National Bank** case was a precipitating factor in the passage several years later of the McFadden Act, which first gave national banks the right to branch (see discussion at Section I-B, infra).

Inasmuch as Congress had specifically accorded to national banks the right to accept deposits and had not specifically limited their means of acquiring them, the Court found that there existed "a clear conflict between the law of New York and the law of the Federal government" (ibid, p. 378).

In its footnote 7 at page 378 the Court pointed to several instances in which the National Bank Act specifically makes national bank operations subject to state law thus demonstrating the approach favored by Congress when it chooses to defer to state law in this area. As the footnote points out, "even in the absence of such express language, national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law." However, the decision in the **Franklin National Bank** case (where no direct reference to the activity in question—advertising—is contained in the federal statute) makes entirely clear that the presumptions, in the absence of a specific deferral to state law, are strongly against state statutes which interfere with national bank operations.

The rationale behind the Congressional scheme generally isolating national banks from state statutory and administrative regulation is easily perceived. Initially, national banks were seen as active instruments of federal policy brought into existence "to aid the government in the administration of an important branch of the public service." **Farmers' and Merchants National Bank v. Dearing**, 91 U. S. 29, 34 (1875). As such instruments they were conceived of as totally beyond the reach of state power.

An equally important reason for strictly limiting the reach of state law into the realm of national bank operations was set forth in **Easton v. Iowa**, 188 U. S. 220, 231 (1903):

> "But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities."

As this case abundantly illustrates, confusion does "necessarily result" when state officials attempt to control the operations of national banks. So long as there are two discrete banking systems clear lines of separation in their supervision are indispensable.

B. **The off-premises activities of national banks are subject to state law only to the extent that they constitute branching as defined by 12 U. S. C. 36 (f).**

Applying to the question presented in this case the rule that state law affects national bank operations only in those areas where state law is specifically deferred to in the National Bank Act or where there is clearly no relevant provision in the Federal Act, express or implied, it is evident that the restrictive Florida statute, applied by the Court of Appeals in this case, is not applicable.

While the National Bank Act, at 12 U. S. C. 36 (c), does specifically incorporate state law with respect to the establishment and operation of new branches, it is equally clear that those off-premises activities of a national bank which are not branching are not subject to state law.

Long before the McFadden Act gave national banks the power to branch, national banks were conducting regular off-premises activities. This Court, as early as 1870, concluded that the National Bank Act permitted national banks to conduct various aspects of their business, particularly through agents, away from the main

banking office, although there was, and is, no specific authority in the Act to do so. In **Merchants Bank v. State Bank**, 77 U. S. 604 (1870), the Court said:

> "It is objected that the checks were not certified by the cashier at his banking-house. The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents." 77 U. S. at 650-651.

The distinction between branching and various other functions performed by banks off-premises was recognized by the Attorney General of the United States in his 1911 opinion (29 Ops. Atty. Gen. 81) which concluded that national banks, at that time, had no power to establish branches. In his opinion (which was specifically cited with approval by this Court in **First National Bank v. Missouri**, 263 U. S. 640 at 658 and in n. 1 on that page) the Attorney General acknowledged the implied authority for national banks to carry on various activities incident to their banking business away from the banking house so long as they did not amount to the general banking business. The distinction was spelled out as follows:

> "These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other class of business incident to the banking business . . .
>
> "These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

"That such a distinction does exist in fact is obvious.

"An agency requires no division of the capital stock, and the details of the business are few and are easily supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution." 29 Ops. Atty. Gen. at 86-88.

It is clear, therefore, that prior to passage of the McFadden Act in 1927 (which added most of what is now section 36), national banks were deemed to be authorized by the National Bank Act to conduct various activities away from their banking house so long as they were relatively simple and did not amount to the "general banking business". Typically such activities were conducted through an "agency" of the bank.

The McFadden Act[8] can in no way be construed as diminishing the powers already possessed by national banks.[9] On the contrary, the Act effected the greatest broadening of national bank powers in the history of the national bank system. Any power conferred by Congress in 1927 must be considered as adding to authority already possessed by national banks. It is in this context that the definitional section incorporated into the Act in 1927 as 12 U. S. C. 36 (f) is properly viewed. Section 36 (f) provides:

"(f) The term 'Branch' as used in this section shall be held to include any branch bank, branch

[8] 44 Stat. 1228.

[9] The relevant legislative history of the McFadden Act is discussed in more detail in the brief of the Solicitor General in No. 932, filed concurrently herewith.

> office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

The plain purpose of the McFadden Act was to give to national banks the right to maintain facilities at which the "general banking business" (namely, receiving deposits, paying checks and making loans) could be carried on in addition to their pre-existing power to conduct various lesser operations off-premises. As to the greater power, added in 1927, Congress concluded that a link to state policy in the area should be forged and so included the section 36 (c) reference to state statutory law.

In a manner which is not entirely clear from its opinion, the Court of Appeals apparently deemed this Court's decision in **First National Bank of Logan, Utah v. Walker Bank and Trust Co.**, 385 U. S. 252 (1966), to signal a retreat from the concept that federal law normally controls national bank operations. Seizing on the **Walker Bank** reference to "competitive equality" which motivated Congress to give national banks branching powers so as to permit them to compete effectively with state banks, the opinion below observes that "before **Walker Bank**, courts had sometimes subordinated [competitive equality] to the desire to adhere to federal law" (A., p. 399). With **Walker**, however, the Court below apparently believed, federal law was rolled back in areas where it had previously been supreme. Such a conclusion is plainly not justified by the facts in the **Walker Bank** case or the language of its opinion.

The issue in **Walker Bank** was the extent to which a national bank activity which undeniably met the section 36 (f) definition of "branch" was subject to state requirements as to how and where such a branch could be estab-

lished. The Court focused on the McFadden Act provision that "new branches" may be approved only if "such establishment" would be authorized to State banks by the State's law, and concluded that whatever limitations were imposed by the state of Utah on the establishment of new branches of state chartered banks should apply as well to national banks. The fulcrum of the Court's opinion is the statement that:

> "It appears clear from this resume of the legislative history of § 36 (c) (1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' **insofar as branch banking was concerned.**" 385 U. S. at 261. [Emphasis added.]

No facts were involved in the **Walker** case relating to a national bank off-premises activity which was not a branch and the Court carefully limited the reach of its language relating to the interplay of federal and state law so as to include only branch banking. No retreat from the Court's earlier approach, most recently evident in **Franklin Bank** can be found in **Walker.** On the contrary, in **Walker** the Court simply reaffirmed the language of section 36 (c) which broadly applies state law to a national bank branch. The Court of Appeals below erred in reading a wider meaning into the **Walker** opinion.

C. 12 U. S. C. 36 (f) provides the only applicable definition of what constitutes a national bank branch.

The District Court below held that:

> "The definition of branch contained at 12 U. S. C. 36 (f) must be deemed to be the exclusive definition with respect to national banks. **Jackson v. First National Bank of Valdosta,** 246 F. Supp. 134 (1965). (A., p. 371).

However, the Court of Appeals found 36 (f) to be "hardly adequate as a definition because it merely sets

out in general terms what everyone knows to be the life-blood functions of banking" (A., pp. 406-407). In so ruling, the Fifth Circuit came into direct conflict with the Court of Appeals for the District of Columbia and with various district courts.

In **Camden Trust Company v. Gidney**, 301 F. 2d 521 (1962), cert. denied 369 U. S. 886 (1962), the District of Columbia Circuit was required to decide if a newly chartered national bank was "for all practical purposes" a branch facility of another bank which had been instrumental in its formation. State law would have precluded the operation of a branch at the location in question.

The Court of Appeals concluded that it was not necessary to consult state law in determining whether the facility in question was a branch inasmuch as the National Bank Act, Section 12 U. S. C. 36, dealing with branching "is clear on its face and says, without ambiguity, exactly what it means" and that "(b)eyond peradventure, Congress even defined the term 'branch' ". 301 F. 2d at 54.

Again, in **Whitney National Bank v. Bank of New Orleans & Trust Co.**, 323 F. 2d 290 (1963), rev'd on other grounds, 379 U. S. 411, the District of Columbia Circuit, in passing on the question of whether an affiliated bank was in reality a branch of another bank, observed that through the section 36 (f) definition, Congress had given "meaning to the word branch" (323 F. 2d at 301).

The Fifth Circuit itself had made clear in an earlier case that it understood the identifying characteristics of a national bank branch to be those stated at section 36 (f). Relating sections 36 (c) and 36 (f), Chief Judge Tuttle stated the Court's interpretation as follows:

> ". . . Thus, a national banking association is precluded from opening any office at which deposits are received, checks paid, or money lent unless a similarly situated state bank would be authorized under state

law to open a similar office. **Jackson v. First National Bank of Valdosta,** 349 F. 2d 71, 72.[10]

In other words, the definition of a national bank branch which requires compliance with state law is an office at which deposits are received, checks paid or money lent, the precise definition set forth at section 36 (f).[11]

The decision of the Court of Appeals below quotes at length and with strong approval from the decision of the United States District Court for the Western District of Washington in the case of **State Chartered Banks in Washington v. Peoples National Bank of Washington,** 291 F. Supp. 180 (W. D. Wash., 1966). In that case the defendant sought to establish a drive-in facility 260 feet away and across the street from a branch of the bank, to be serviced by two tellers and a supervisor (ibid. at 183). Defendant admitted that "the proposed facility will receive deposits and pay checks" (ibid. at 195). It was not disputed that Washington state law would have prohibited a branch at the proposed site.

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[10] The Court of Appeals in **Valdosta** remanded the case to the District Court to determine if a branch, as so defined, had in fact been established. The District Court subsequently found that the facility met two of the three criteria set forth in section 36 (f) and was therefore a branch. In so doing the Court said:

> "This court is convinced that in construing the definition of 'branch' found in 12 U. S. C., § 36 (f) it should be guided by federal considerations. In other words 'branch' should be defined according to federal law . . ."
>
> "The patent meaning of this part of the statute is that an 'additional office' or 'branch place of business' will be considered a 'branch' for purposes of § 36 if any one of the three specified conditions is met, i. e., if deposits are received or checks are paid or money is lent." **Jackson v. First National Bank of Valdosta,** 246 F. Supp. 134, 138 (M. D. Ga. 1965).

[11] Congress itself referred to section 36 as a definition of the term "branch". H. Rep. No. 583, 68th Cong., 1st Sess. (1924), p. 3. This report and such other legislative history as exists with respect to section 36 (f) is discussed in the brief of the Solicitor General in No. 932, filed concurrently herewith.

The opinion covers many issues but the one for which the Court below primarily cites it is the effect of section 36 (f) on the off-premises activity.

It is perfectly clear, however, that the Washington opinion is directly contrary to the conclusion reached by Judge Goldberg in this case. The Washington Court considered the relationship of federal and state law in the branching area and concluded that 12 U. S. C. 36 (f) provides the definition of the "functions" of a national bank branch. If it is determined that one of the three functions there set forth (receiving deposits, paying checks or lending money) is present, one must then look to state law for further "refinements" to the definition. Thus, the Court said:

> ". . . This decision [Valdosta] makes it fairly clear that **once the facility passes the broad functional test set forth in section 36 (f) the state law takes over** and may further define 'branch' in such a way as to comport with the state's banking policy. This was precisely the purpose Congress had in mind when it passed the McFadden Act. [Emphasis supplied.] (291 F. Supp. at 195.)
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> * * * * * * *
>
> "The test of 'banchness' in this situation is therefore twofold—(1) Does the facility fit the broad functional definition laid down by Congress in Section 36 (f), **and if so**, (2) Does the state law add any more refinements to the definition? [Emphasis supplied.] (id.)

Since defendants there admitted that the proposed facility received deposits and paid checks it plainly met the "functional" tests of section 36 (f) thus bringing state law into play. Had there been no finding that one of the three section 36 (f) functions was performed at the facility, which was the finding of the District Judge in this

case, there would have been no occasion for the application of state law.

In other words, section 36 (f) is a definition of the term "branch". If a national bank activity falls within the perimeters of that definition then it is a branch, and subject to state law. Petitioner, First National, thoroughly concurs in this statement of the law. If this is the proper construction of sections 36 (c) and (f), the decision of the Court below to ignore the section 36 (f) requirements and look directly to the Florida law is in error.

Apparently recognizing the direct inconsistency between the decision of the Court below and the **State Chartered Banks** opinion upon which it is so heavily based, respondents have attempted in their brief in opposition to First National's petition for certiorari to recast the Fifth Circuit opinion in a more defensible light. Correctly stating the law, respondents assert: "Since the activity must be a branch as defined under section 36 (f) before state branching law ever comes into play, any facility which did not have the characteristics of a branch under federal law would not be controlled by state law" (Resp. Brief, p. 15). Respondents then imply that the Court of Appeals decided that First National's messenger and receptacle services involved the performance of the activities listed in section 36 (f) and accordingly constitute branches.

It is clear, however, that the Circuit Court specifically failed to make a determination as to whether First National's off-premises activities included any of the section 36 (f) functions prior to applying Florida law to find those activities unlawful. The District Judge had found that deposits were not received nor checks paid nor money lent away from First National's banking premises,[12] and that

[12] There had been no serious contention that money was lent off-premises; see fn. 13, infra, p. 24.

". . . the armored car and receptacle services . . . do not constitute branching . . . in violation of 12 U. S. C. 36 . . ." (A., p. 371).

On appeal, the briefs and arguments of the parties were directed largely to the question of whether the District Court had been correct in so finding. In particular, the dispute revolved around the issue of whether the physical transfer to cash from customers to the Bank's messenger constituted receiving a deposit.

Nevertheless, in its opinion, the Court below did not disturb the District Court's finding that the section 36 (f) functions were not performed. Instead the Court observed:

> ". . . that courts must not look to Section 36 (f) as their sole guiding light but must permit rays of state law to refract and reflect their statutory vision" (A., p. 400).

and that:

> ". . . Congress did not seek to devitalize Section 36 (f) with eternally static concepts, we likewise conclude that flexibility is to be accorded not by any federal common law of branching, but rather by recourse to state law" (A., p. 407).

The Court then held that:

> "The Florida statute permits only one place of business, and this direction is uncomplicated unhedged, and unmodified. 'Doing business' in Florida can be minimal. Cf. **Phillips v. Hooker Chemical Corp.**, 5 Cir. 1967, 375 F. 2d 189. Unless we were to cast away all concepts of the functional 'business' of a bank, we would have to conclude that First National was 'doing business' with its extra services" (A., pp. 408-409).

Inasmuch as Florida law is applicable to First National's activities in this instance only to the extent that

they constitute branching, as defined at section 36 (f), it was error for the Court of Appeals to apply Florida law in the face of the District Court's decision that the functions set forth in the federal statute are not performed. Inasmuch as the federal branching definition is not met by the operations in question, the Court's conclusion that First National's activities fell within Florida's "minimal" doing business standard is irrelevant.

II.

First National's Messenger and Receptacle Services Do Not Constitute Branching Within the Meaning of the National Bank Act.

From the inception of this litigation the factual dispute has been cast in the context of the National Bank Act definition of banking, 12 U. S. C. 36 (f). The District Court received testimony, voluminous depositions and other evidence relating to the operations of First National's messenger and receptacle services, focusing particularly on the extent to which they might involve receiving deposits, paying checks or making loans. On the basis of the facts the Court concluded that First National's off-premises operations "are not branches within the meaning of 12 U. S. C. 36" (A., p. 376).

In the Court of Appeals much of the briefing and oral argument centered more specifically on the question of whether First National's messenger and receptacle operations constituted receiving deposits off-premises.[13] The

[13] In the Courts below, the State Comptroller made only the briefest reference to the possibility that First National might be making a temporary loan by means of its "change accounts." The point was not pursued but, in any event, it is clear that if any such loan was made (which the District Court found not to be the case), it would have been made at the main banking house when the messenger received the funds. Respondents' Brief in opposition to First National's Petition for Cer-

Court's opinion, however, avoids any discussion of the point and, in effect, leaves undisturbed the District Court's finding that deposits are not received, checks paid or money lent, by First National's messenger and receptacle services. The Court of Appeals' decision merely concludes that, under Florida law, the Bank is "doing business" off-premises in the "minimal" sense required by Florida law.

The question of when a deposit is received is an important one in commercial transactions and is governed by contract between the parties and well-defined judicial and statutory limitations. The transactions performed through First National's messenger and receptacle services cannot, by any definition, be considered receiving deposits and the District Court was correct in so holding.

A. **A deposit is a contractual relationship which has a well defined meaning.**

The word "deposit" as used in statutes and in commercial transactions connotes "a transaction peculiar to the banking business, and one that the courts should recognize and deal with according to commercial usage and undertaking." 5A Michie, **Banks and Banking**, § 4A at 22 (1950); **National Surety Co. v. McCormick**, 268 Fed. 185 (7th Cir. 1920); **McCormick v. Hopkins**, 287 Ill. 66, 122 N. E. 151 (1919).

The determination of when a deposit is created is not a casual one inasmuch as it gives rise to the relationship

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tiorari omits any assertion that Petitioner Bank is making loans off-premises.

The "change account" was also cited by the State Comptroller as a means of "cashing" checks off-premises. The District Court took note of this possibility and specifically reserved approval of the practice. First National subsequently discontinued the practice and the question is now moot. **Amalgamated Association v. Wisconsin Board**, 340 U. S. 416 (1951).

of debtor and creditor. **Tarrent County Water Control and Improvement District v. Maxwell,** 109 F. 2d 604, 606 (5th Cir. 1940), cert. denied, 310 U. S. 633, **Northern Sugar Co. v. Thompson,** 13 F. 2d 829 (8th Cir. 1926); **In Re Thourer' Estate,** 166 So. 2d 476 (Fla. App. 2d Dist. 1964).

The deposit relationship of debtor and creditor is created by the contractual relationship of the bank and the depositor and the two parties may agree to any lawful terms to govern the creation, duration and termination of that relationship. The general rule has been stated as follows:

> "The relation of depositor and banker arises only out of contract, express or implied . . ."[14]
>
> "The parties may contract as to the terms and conditions under which the bank will handle a deposit, and, in the absence of a violation of statute or other rules of law, a bank deposit is subject to any agreement that the depositor and banker may make with regard to it, so long as the rights of third persons are not injuriously affected. Thus, where the parties so agree, a bank deposit may constitute a bailment, title to the fund remaining in the depositor and not passing to the bank . . ." 9 C. J. S., **Banks & Banking,** § 267, pp. 545-547.

A deposit will not be implied absent such a conscious contractual understanding.

> "Title to money does not pass from the legal owner thereof to the bank, and the relation of creditor and debtor does not arise between them as to money deposited without his knowledge or consent. No one can

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[14] This principle has been regularly applied in Florida; see e. g., **McCrory Stores v. Tunnicliffe,** 104 Fla. 683, 140 So. 806 (1932). Florida law governs the construction of contracts entered into in that jurisdiction. 5A Michie, **Banks & Banking,** Chap. 9, § 5 at 29 (1950).

create this relation between the owner of money and the bank without authority from the owner." 5A Michie, **Banks & Banking**, § 15 at 38-39 (1950).

B. **The service performed through First National's messenger and receptacle does not constitute receiving deposits.**

The essential elements of the operation at issue in this case are not complex. First National enters into contracts with its customers to pick up cash and items from them for delivery to the bank where they will be received as deposits and credited to the customers' accounts. First National also contracts to debit customers' accounts and deliver the monies to customers. The pick-up of items for delivery to the Bank is done both by messenger directly at the place of business and through a stationary receptacle. In all instances of pick-up and delivery, a contractual instrument purports to define the relationship of the parties.

As a matter of practice the Bank requires that cash or other items picked up either from a customer's place of business or from the receptacle be accompanied by a Messenger Transmittal Slip[15] specifying that the parties agree that monies picked up "shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house" and that the Bank acts "solely as agent for said Principal" (customer) in picking up the funds. In most instances, a Comprehensive Dual Control Contract to the same effect has been signed by both parties. All deliveries of money are made pursuant to the Dual Control Contract and require signature of the Messenger Service Debit Slip stating that the customer's account has already been charged for the amount delivered.

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[15] Or a transmittal envelope incorporating by reference the language of the transmittal slip.

The intent of First National and its customers that no deposit be considered received until the monies are received at the banking house is therefore explicitly incorporated into the contractual documents which govern their transactions.[16]

It is equally clear that the effect of these contracts is fully appreciated, as a practical matter, by the Bank's employees and customers. Thus, the bank messenger recounted his instructions as follows:

> Q. What were you directed or told at these meetings? A. To make sure that the customer understood that when this money was brought to the bank it was not a deposit until it got to the bank and we were merely acting as their agent in transporting it; . . . (A., p. 66).

The Manager of Eckerd's Store testified as follows:

> Q. Do you know when your funds are credited to your account in the bank? A. To the best of my knowledge when the deposits are checked in at the bank (A., p. 230).

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[16] Respondents alleged below that First National's customers did not always follow the Bank's established procedures in using the messenger service. For instance, it was established that, on at least one occasion, a customer had used a transmittal slip which did not contain the customary contractual language. The District Court dismissed this argument as follows:

> "In declaring judgment on the issues involved in this partial summary judgment the Court passes only on the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect. The fact that in particular instances a customer or one of the bank's employees may have deviated from the authorized and established procedures does not detract from their lawfulness. The record affirmatively shows that the bank has actually carried out its declared intent in the execution of the specific operation to a substantial degree. This is enough to entitle it to a judicial determination of legal efficacy in this declaratory degree action" (A., pp. 373-374).

A supermarket owner described his understanding of the Service in the following language:

> Q. Did you sign any agreement with the bank authorizing them to charge your account? A. Well, I understood, Mr. Smith, when I signed up for this service that when I got money by this method that it would be charged to my account when it left the bank; and if I had any monies to deposit to the bank, it would not be deposited to my account until it got to the bank (A., p. 329).

Arrangements such as those provided by First National for the transmission of monies to the banking house for deposit are not uncommon. Even without the careful contractual language present here, such dealings are not considered to give rise to receipt of deposits until the funds are delivered to the Bank's office. Thus, in **Moses Lake State Bank v. Bell**, 223 P. 587, 589 (1924), the Supreme Court of Washington ruled as follows:

> ". . . It seems to be well settled banking law that in order to charge a bank with liability as for a general deposit the deposit must have been actually made at the banking house of the bank sought to be so charged, and that when a would-be depositor of a bank places his funds, whether in the form of cash, checks, or drafts, in the hands of another at some place away from the bank, even though such other person be an officer of the bank, there is not thereby consummated a deposit chargeable as such against the bank, however much the would-be depositor and such other person may have intended such act as consummating a deposit. Such act goes no farther in its legal effect than to make the person so receiving such funds an agent of the would-be depositor to cause such funds to be actually deposited in the bank at its usual place of doing business."

Similarly, the placement of funds in the Bank's receptacle, though intended to lead to a deposit, does not constitute receiving a deposit. The receptacle was found by the District Court to be "an arrangement analogous to night-depositories found at most banks" (A., p. 372). The Court then held that "(i)t is well settled that the placement of funds in such depositories does not create a depositor-depositee relationship but rather one of bailor-bailee" (A., p. 372).

The effect of placing funds in a receptacle to be retrieved by a bank for deposit was described in **Bernstein v. Northwestern National Bank**, 157 Pa. Super. 73, 41 A. 2d 440, 441 wherein a customer sued his bank to recover the amounts of cash and checks which he had placed in the bank's night depository and which subsequently disappeared. The Court ruled for the bank saying:

> "A general deposit was contemplated by the parties as indicated by the bank in advertising the service and the procedures adopted by it. The mere placing of money in the mechanical depository, however, did not result in a general deposit. The device was no more than the means of initiating such deposit. Delivery by this method was a tender to the bank for that purpose but was a bank deposit only in the making. Some unequivocal act by the bank thereafter was necessary to make it a general deposit and to create the status of debtor and creditor. This relationship cannot result without the consent of both parties to the transaction."

Accord: **Nordin v. Eagle Rock State Bank**, 139 Cal. App. 584, 34 P. 2d 490 (1934); 10 **Am. Jur.** 2d, Section 358 (1963).

C. **The term "deposit" as used in 12 U. S. C. 36 (f) should be given its customary meaning.**

Virtually no legislative history exists with respect to the incorporation of the section 36 (f) definition into the McFadden Act in 1927[17] or its reexamination in the Banking Act of 1933. However, considerable light is cast on what in all probability was the Congressional understanding in enacting section 36 (f) by an examination of the Banking Act of 1935[18] which amended certain sections of the Banking Act of 1933 creating the Federal Deposit Corporation.

Section 101 of the 1935 Act contained a definitions section which defined both "branch" and "deposit" as follows:

> "(15) The term 'branch' includes any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State of the United States or in Hawaii, Alaska, Puerto Rico, or the Virgin Islands at which deposits are received or checks paid or money lent."
>
> "(12) The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage . . ."

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[17] See n. 11, p. 20, supra.

[18] 49 Stat. 685-686; 12 U. S. C. 1813.

The 1935 definition of "branch" is in every relevant respect identical to the language of 12 U. S. C. 36 (f) by which "branch" was defined in the 1927 and 1933 National Bank Act legislation. Unlike the earlier bills, however, Congress provided in 1935 a key to interpretation of the branch section's use of the word "deposit". The later definition ". . . was not intended to change or modify the law but to express the Congressional interpretation of the meaning of the word 'deposit' as it existed in the act from the beginning." **FDIC v. Records**, 34 F. Supp. 600, 602 (W. D. Mo. 1940).

Courts interpreting the 1935 Act have regularly reached the conclusion that a deposit comes into being only where the relationship of debtor and creditor has been established. **FDIC v. Continental Illinois Bank and Trust Co.**, 245 F. 2d 567 (7th Cir., 1957), cert. denied, 355 U. S. 877; **FDIC v. Deaton**, 105 F. 2d 677 (10th Cir., 1939); **Farmers State Bank of Amherst**, 67 S. D. 51, 289 N. W. 75 (1939).

In other words, in the light of the Banking Act of 1935 an off-premises banking service which gathered funds for transport to the bank would not be engaged in receiving deposits absent some clear agreement between bank and customer that a debtor-creditor relationship was to be established prior to receipt of the funds at the banking house. In view of the virtual identity of branch definitions in the 1927 and 1935 acts and the close proximity in time of enactment, there is every reason to believe that Congress had the same substantive activities in mind each time it defined "branch". This is especially so since the 1935 definition closely reflects the general commercial usage discussed above.

In addition to the interpretation of the concept of "receiving deposits" required under the FDIC Act and the ruling of the Comptroller of the Currency interpreting

12 U. S. C. 36 (f)[19] both of which make clear that First National's messenger and receptacle do not constitute such receipt, the Board of Governors of the Federal Reserve System, which supervises all state member banks has reached the same conclusion with respect to the banks under its jurisdiction.[20] In a ruling published at 12 C. F. R. 208.110, the Board ruled as follows:

> "It is assumed, however, the service in question would involve picking up deposits at the respective addresses of particular customers and the payment of checks drawn by such customers on the bank; that the 'messenger' normally would be an armored car owned by the bank or by an independent contractor; that the cost of the service would be borne by the bank; that, in the case of deposits, there would be a written agreement between the bank and the customer under which the messenger would act as agent of the customer and the bank would assume no liability for the funds collected until they were received by it from the messenger at the bank's premises; and that, in the case of payment of checks, the checks would be presented at the bank's premises by the messenger acting as agent of the customer and the proceeds received by the messenger for transmittal to the customer, with no liability on the part of the bank for such proceeds after their delivery to the messenger.
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> "Assuming the facts to be as stated above, the Board does not regard such arrangements as involving the establishment and operation of branches by

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[19] Comptrollers Manual for National Banks, § 7490 (A., p. 381).

[20] 12 U. S. C. 31 provides that, with the approval of the Board, State member banks may retain and operate branches on the same terms and conditions as national banks. This requires the Board to interpret 12 U. S. C. 36 (f).

State member banks. Whether the use of messenger service in other circumstances would constitute branch banking would, of course, have to be determined on the basis of the facts involved."

Administrative interpretations of the National Bank Act are thus in accord that the kind of off-premises activities conducted by First National do not involve receiving deposits so as to constitute branching within the meaning of the federal legislation.

CONCLUSION.

The First National Bank in Plant City first offered a messenger service to its customers in October of 1966. For three years without ceasing it has been required to litigate its right to provide this basic service. The trier of fact found the service to be lawful. The issues have been fully briefed before three courts. First National now respectfully urges this Court to put an end to this litigation by ruling that its operations are governed by the National Bank Act and that they are in compliance with the requirements of that Act.

Respectfully submitted,

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STATUTORY APPENDIX.

APPENDIX A.

12 U. S. C. 36:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) (1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State

from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to state banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus,

if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-604 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

APPENDIX B.

Section 659.06, Florida Statutes:

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on prop-

erty contiguous thereto. Property which is separated from the property on which the main banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 777

THE FIRST NATIONAL BANK IN PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

Brief on Behalf of
The First National Bank of Cornelia, Georgia, et al.
As Amici Curiae
In Support of Petitioners

This brief, with the written consent of all respondents, is filed on behalf of the following twenty-two

national banks as Amici Curiae in support of the petitioners in the above-entitled cases:

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION
San Francisco, California 94120

CANAL NATIONAL BANK
188 Middle Street
Portland, Maine

CONTINENTAL NATIONAL BANK OF FORT WORTH
Houston at Seventh
P.O. Box 910
Fort Worth, Texas 76101

EXCHANGE NATIONAL BANK OF CHICAGO
130 South LaSalle Street
Chicago, Illinois 60690

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
City of Pittsfield, Massachusetts

FIRST NATIONAL BANK OF ARIZONA
411 North Central Avenue
Phoenix, Arizona

FIRST NATIONAL CITY BANK OF NEW YORK
55 Wall Street
New York, New York

FIRST SECURITY NATIONAL BANK OF BEAUMONT
505 Orleans Street
Beaumont, Texas 77704

FIRST UNION NATIONAL BANK OF NORTH CAROLINA
301 South Tryon Street
Charlotte, North Carolina

IDAHO FIRST NATIONAL BANK
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Boise, Idaho 83707

MANUFACTURERS NATIONAL BANK OF DETROIT
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Detroit, Michigan 48226

National Bank of Detroit
611 Woodward Avenue
Detroit, Michigan 48232

North Carolina National Bank
200 South Tryon Street
Charlotte, North Carolina

Peoples First National Bank
Miami Shores, Florida

The Chase Manhattan Bank (National Association)
1 Chase Manhattan Plaza
New York, New York 10015

The First National Bank of Chicago
38 Dearborn Street, South
Chicago, Illinois

The First National Bank of Cornelia
119 South Main Street
Cornelia, Georgia

The Howard National Bank and Trust Company
111 Main Street
Burlington, Vermont 05401

The Indian Head National Bank of Nashua
146 Main Street
Nashua, New Hampshire 03060

The State National Bank of Connecticut
2834 Fairfield Avenue
Bridgeport, Connecticut 06605

Virginia National Bank
One Commercial Place
Norfolk, Virginia

Western Pennsylvania National Bank
435 Smithfield Street
Pittsburgh, Pennsylvania 15222

OPINIONS BELOW, JURISDICTION, QUESTION PRESENTED, STATUTES INVOLVED, STATEMENT OF THE CASE

The Amici Curiae agree with and adopt as their own the sections in petitioners' briefs on the merits entitled Opinions Below, Jurisdiction, Question Presented (as stated by the Solicitor General), Statutes Involved and Statement of the Case.

INTEREST OF AMICI CURIAE

All twenty-two Amici Curiae joining in this brief are national banks. Their home offices are located in seventeen states. Some operate branches—as many as 900 different offices—and some do not. All carry on activities which either already have been or could possibly be affected by the ruling in *Dickinson* or by a logical extension of that ruling by state officials, including State Banking Commissioners. In fact, as shown in our Argument below, state officials, relying on *Dickinson,* have already challenged national bank activities in several states in which some of the Amici banks are located. All of the Amici Curiae, therefore, have an immediate and direct interest in this Court's reversal of the Fifth Circuit's decision and judgment in that case.

The Amici Curiae originally filed a Motion for Leave to File a Brief in Support of the Petitions for Writs of Certiorari, and this Court granted the Motion on February 24, 1969. 37 U.S.L. Week 3308. The instant brief is filed with the consent of all respondents, as shown by letters on file with the Clerk.

ARGUMENT

An affirmance of the Fifth Circuit opinion by this Court would result in an extraordinary disparity of treatment of national banks by the various states and—just at a time when the public is demanding expanded bank facilities—a substantial reduction of services already in effect as well as a restriction on those services just now coming into being.

Both the disparity of treatment and reduction of services can easily be demonstrated by events which have already transpired in states other than Florida since this issue arose in the Fifth Circuit.

For example, the Attorney General of North Carolina, specifically citing *Dickinson,* recently ruled that loan production offices constitute branch banking within the North Carolina statute, even though these same offices had been specifically approved for member banks by the Federal Reserve Board only four months prior to his ruling. 33 F.R. 11812 (August 14, 1968). Using the example of an automobile dealer who relays the loan application information to the bank, which must then approve the loan, the Attorney General wrote the North Carolina Commissioner of Banks: "* * * it is my opinion that the automobile dealer is acting as the agent for the bank and the bank is in fact making a loan at the automobile dealer's place of business. In my opinion such course of dealing constitutes carrying on the business of banking at the automobile dealer's place of business and, therefore, would be an unauthorized engaging in the banking business at the location in question unless the bank was authorized to conduct a branch bank at such loca-

tion." Letter dated December 23, 1968, to Mr. Frank L. Harrelson, Commissioner of Banks.

Using this reasoning, even an independent armored car operation, such as Brinks, could be outlawed in some states under the *Dickinson* decision if it operated under contract with a bank, as of course it must if it is to transport the bank's funds.[1]

In fact, under the North Carolina interpretation, virtually *any* off-premises activities could be enjoined as unauthorized branching. The seriousness of such a development can be gauged by an examination of typical activities by a national bank in the state, Amicus North Carolina National Bank. That bank is part of the BankAmericard credit card operation; finances new cars through automobile dealers; solicits new businesses, loans, deposits and trust accounts away from its office, and engages in a number of correspondent bank activities. Similarly, Amicus The Union National Bank of North Carolina operates a charge card plan; sells data processing services, and carries on a courier service to pick up checks, clearing items and data processing work for correspondent banks in a several-state area and for non-bank customers who use the bank's data processing services for payroll, billing, and other record maintenance.[2]

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[1] By way of example, Amicus Manufacturers National Bank of Detroit uses Brinks, and Amicus The State National Bank of Connecticut uses Federal Armored Car Service of Bridgeport.

[2] Off-premises activities are not restricted to any one section of the country. Thus, Amicus Canal National Bank, Portland, Maine, engages in a number of such activities which might possibly come under the *Dickinson* rationale: money order sales through bank customers (savings banks and retailers); the use of Post Office lock box arrangements; procedures by which trust officers pick up securi-

The fact that outlawing all these activities is a very real possibility in some states under the *Dickinson* opinion is illustrated by a Georgia case which is now pending in the Fifth Circuit.

In *Jackson* v. *First National Bank of Cornelia, Georgia,* 292 F.Supp. 156 (N.D.Ga. 1968), the District Court relied entirely on the *Dickinson* opinion. The suit was filed by the Superintendent of Banks of the State of Georgia and a number of intervening state banks, seeking to enjoin the First National Bank of Cornelia, Georgia, from operating an armored car bank

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ties at the customer's residence or elsewhere when a trust is being established; the signing of loan agreements, contracts, and trust agreements in law offices and business offices; the use and activities of collectors (bank employees) for the bank's installment loan division, and all outside solicitations. In addition, the bank is considering the purchase and use of automatic deposit machines to be placed in strategic retail locations, and "inplant" banking, both of which have come under interdiction in other jurisdictions.

New York law provides:

> No bank or trust company or officer, director, agent or employee thereof, shall transact any part of its usual business of banking except * * * [at its principal office and authorized branches. N.Y. Bank. Law § 105(1).]

While the phrase, "usual business of banking," has not to our knowledge been interpreted by either the New York courts or the New York banking authorities, it is possible that any of the following activities normally carried on by many New York banks (in addition to offsite depositories and the armored car and messenger services involved in *Dickinson*) might be challenged if conducted by a bank at a non-branch location: loan solicitation and servicing (including the servicing of mortgage loans made by other banks or financial institutions), factoring, equipment leasing, mortgage warehousing, data processing, accounting and bookkeeping services, sale of travelers' checks and money orders and solicitation of bank credit card customers. In regard to the sale of travelers' checks by agents of a bank, see *Bank of America* v. *Lima,* 103 F. Supp. 916 (D. Mass. 1952).

messenger service in parts of Georgia and North Carolina. The complaint alleged that this service constituted illegal mobile branch banking under 12 U.S.C. §§ 24 (Seventh), 36(c), (f), and Title 13 of the Code of Georgia, § 201 *et seq.* The bank answered and counterclaimed for an injunction and declaratory judgment. The Comptroller of the Currency of the United States intervened as a defendant in support of the bank. Following a hearing, the District Court made findings of fact and permanently enjoined the bank from engaging in its armored car bank messenger service, even if the service is carried out under an agreement providing that the armored car messenger is the agent of the customer and not of the bank. On December 16, 1968, Mr. Justice Black stayed the District Court's order pending final disposition of the instant case. Similarly, the Fifth Circuit has deferred all further appeal proceedings in its own court in the *Bank of Cornelia* case until *Dickinson* has been resolved.

The District Court in *Bank of Cornelia* held that the purpose of 12 U.S.C. § 36(c) is to place national and state banks on a basis of "competitive equality," and that this "is accomplished by adopting, in full, the state branch banking law as federal law in the various states." 292 F. Supp. at 160. Branch banks are defined by Georgia law as "any additional place of business of any parent bank not located within the particular city * * * where its parent bank was chartered." Ga. Code § 13-201.1(b). Georgia law prohibits the establishment of any new or additional branch bank anywhere in the State after February 9, 1960. Ga. Code § 13-203(c). In addition, a parent bank in Georgia may operate only one additional bank office or

facility within the particular city where the parent bank is situated if that city has a population not exceeding 40,000. Ga. Code § 13-203.1. These provisions of the Georgia law were incorporated into "federal law" by the District Court, relying specifically upon *Dickinson*. 292 F. Supp. at 160, 161.

The District Court held that it must accept the position of the Georgia Superintendent of Banks, because "There is no decision of the Georgia Supreme Court contrary to this interpretation * * *." *Id.* at 161. Thus, the District Court concluded that the Bank of Cornelia's armored car bank messenger service was illegal because it constituted not only branch banking prohibited by Georgia law but also the carrying on of a banking business through banking facilities other than on the premises of the bank's place of business, also prohibited by Georgia law.

The effect of this decision, if allowed to stand by an affirmance in *Dickinson,* would be to bar for all time not only the armored car messenger services of national banks in Georgia but also the extension of services of such banks beyond the borders of their immediate cities. Further, the extent of the ruling is demonstrated by the response of the District Court to the following remarks of counsel made during oral argument:

> It's undisputed in the record here that Georgia banks can and do conduct many off-premises activities: officer call programs at a place of business to solicit loans and deposits; calls on new customers; trust representatives calling off-premises on potential or existing trust customers; participation in loan closings, again off-premises; visits to and assisting sometimes in the management with

> or of correspondent banks; foreign branches overseas conducted by both State and National Banks, or participation in corporations organized under the Edge Act to conduct foreign banks; credit cards. [Transcript of Sept. 26, 1968 hearing, pp. 12-13.]

The Court's response was that the Georgia Superintendent, under the *Dickinson* decision, could declare each of these activities by national banks to be illegal. *Id.* at 18. Thus, as demonstrated in North Carolina, *every* off-premises activity by a national bank (with the exception of foreign activities—see 12 U.S.C. § 36 (g)) is now subject to attack by state commissioners, if the *Dickinson* and *Bank of Cornelia* decisions become binding law. The chaos that may well result can hardly be overstated.

As a matter of fact, the impact of the *Bank of Cornelia* decision even on the communities served by the Bank's armored car service would be devastating. As shown by the District Court's findings, the Bank's three armored trucks make 1,415 different calls on 505 separate customers every week. 292 F. Supp. at 158. This service has been provided for more than two years. The trucks pick up cash and checks for the purpose of transporting them to the bank, carry small bills and coins for changing larger bills, transport cash to certain customers, and provide a payroll cashing service to a number of customers. Of the ten counties covered by this armored truck service, every one is located in Appalachia, recognized by the Government as one of the most destitute sections of the United States. The hundreds of businesses served by these trucks are almost exclusively small ones, and most are located in rural or mountain areas from five to twenty miles away

from the nearest town and the nearest bank. Thus, personal deliveries of money to and from the bank would be not only difficult but extremely hazardous if the customers had to undertake these deliveries themselves.

Just as is the case in *Dickinson,* the Bank of Cornelia's armored messenger service has been operated pursuant to a specific ruling by the Comptroller of the Currency of the United States to the effect that such a service is legal so long as an agreement between the bank and its customers specifies that the messenger is the agent of the customer (Comptroller's Manual, par. 7490). The District Court found that such agreements have been in effect between the bank and its customers. 292 F. Supp. at 158, 159. Nevertheless, the service was outlawed and permanently enjoined pursuant to the *Dickinson* ruling.

As in North Carolina, both the Banking Commissioner and the Attorney General of Illinois have recently ruled that certain off-premises activities of banks are prohibited by the Illinois Banking Act (as revised 1968), 16½ § 106.[3] Specifically, they have outlawed any mechanical devices, such as a "Lectro-Teller,"[4] which are located at places other than the

[3] This section provides: "No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business."

[4] The Lectro-Teller accepts currency in denominations from one to twenty dollars and coins, issues a printed receipt for the amount deposited, and in addition accepts items for collection such as checks. All of these items may be included in the same deposit.

principal office of the bank and in which checks and funds are placed by bank customers for delivery to the bank.[5] They held this type of machine illegal even though it "issues a receipt stating the bank assumes no liability until delivery is made to the bank by the owner of the machine."[6]

Yet in the contiguous state of Kentucky, precisely the opposite is true. The Kentucky Attorney General has ruled that although the operation of the Lectro-Teller by the bank itself would be illegal branch banking under state law (Ky. R. S. 287, 180), it is perfectly permissible to operate such machines through agents, such as an armored car company, so long as it appears "that the bank does not own or control the machine and assumes no liability whatever for the deposits made in such machine until such time as the Armored Car Service actually makes such deposit with the bank at its authorized place of business."[7]

The result is that a *national* bank, governed by *federal* law, which happens to be located on one side of

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[5] Commissioner's letters of September 26, 1968, and November 26, 1968, to all Illinois banks; Attorney General's letter to the Commissioner dated November 22, 1968 (File No. UP-2023).

[6] Letter of November 26, 1968, *supra* n. 5. Amicus First National Bank of Arizona has some fifty Lectro-Tellers distributed in supermarkets, drug stores and the enclosed malls of four regional shopping centers. In these same malls, it also has night-drop facilities. In both instances the facilities are operated by Atlas Services under contract with the bank, but if the North Carolina Attorney General's opinion were to be adopted elsewhere, the operator of a service could be deemed merely the agent of the bank, so that the service could be converted from an independent operation into branch banking. Yet "deposit machines" have been specifically authorized for national banks by par. 7491 of the Comptroller's Manual for National Banks.

[7] OAG 69-180, letter of March 31, 1969, from Attorney General Breckinridge to the Commissioner of Banking and Securities.

the Ohio River, can use as many Lectro-Teller machines as it wishes by the simple device of entering into an operational agreement with a third party, whereas another *national* bank on the other side of the river, governed by the *same* federal law, cannot use the machines at all, regardless of any agreements it may have with third parties. And this result comes about under the assumption that Congress, despite its definition of branch banking in the federal statute, actually intended to leave the interpretation of branch banking to the states, and the states in turn are free to rule that a stationary, unattended deposit machine is a "branch bank" in one instance but is not a "branch bank" in another. We say that Congress intended no such thing and in fact was fearful of just such a crazy-quilt, patchwork kind of treatment accorded federal banks by the states. In another context but with language especially applicable here, this Court has said that "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Rice* v. *Akron, Canton & Youngstown R. R. Co.*, 342 U.S. 359, 361 (1952). The situation in Illinois and Kentucky in regard to electric machines amply demonstrates the logic of that statement and the vice of unequal treatment.[8] But there are many other examples of the identical vice.

In the same opinion in which they outlawed electric machines in Illinois, the state's Banking Commissioner

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[8] In Oklahoma, the Attorney General has filed suit attacking the use by national banks of Lectro-Teller machines, and the manufacturer of the machines has entered the case as an intervenor. *The First National Bank and Trust Co.* v. *Blankenship*, No. Civil 68-451, W.D. Okla. The District Court in that case has indicated that if the stay in *Dickinson* is vacated by this Court, a restraining order will be entered against the use of the Lectro-Teller machines.

and Attorney General also outlawed loan production offices, which they described as offices apart from the main bank where preliminaries for loans are conducted with prospective borrowers. This ruling was made even though "the finalization of loans so initiated occurs at the main bank * * *." In his September 26 letter (*supra* n. 5), the Commissioner specifically cited and relied on the Fifth Circuit's *Dickinson* decision. Similar loan production offices, where a car or appliance dealer processes a loan to a customer on behalf of the bank, are maintained by a number of the Amicus banks, including the Virginia National Bank.

In a letter dated December 21, 1959, the Attorney General of Michigan wrote the state's Banking Commissioner his opinion (No. 3464) that a mobile banking service, which moved from location to location in order better to service the bank's customers, was branch banking in violation of Michigan's requirement of a stationary banking operation. Opinions, Attorney General, Vol. 1, 1959-60, p. 238. On the other hand, a mutual savings bank in Pittsfield, Massachusetts—the City Savings Bank—has been given permission by the state Commissioner to operate just such a mobile bank.[9]

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[9] As mentioned above, a number of banks maintain data processing centers and administrative offices off premises. Many larger banks now do most of their data processing and paper work at administrative buildings which are not connected with a certified main office or branch. Customers may or may not visit these offices, depending on the bank. Thus, the national bank involved in *Wingate Corp.* v. *Industrial National Bank of Rhode Island*, 1st Cir., No. 7186 (decided March 27, 1969, solely on the issue of standing to sue), where plaintiff is challenging the right of a national bank to offer data processing services to other banks and bank customers, has established a $5 million underground, bomb-proof computer center in the suburbs of Providence, about ten miles from the bank's main office. Other illustrations are the

As to national credit cards, the Court can imagine the extraordinary confusion that would result if these operations were treated as branching under the various state statutes—prohibited entirely in some states and allowed under varying conditions in all the others.

Still another state that graphically illustrates the danger of the *Dickinson* rationale is Texas. Both the Texas Constitution (Art. XVI, § 16)[10] and a Texas statute (Texas Banking Code of 1943, as amended, Title 16, Art. 342-903) prohibit branch banking. The constitutional provision has been broadly interpreted in a thirty-eight page letter from the State Attorney General to the State Banking Board (August 18, 1952) as reaching many more activities than "technical branch banking" (p. 9). He ruled, for example, that "chain and group banking are just as violative of the Texas Constitution as branch banking" (p. 11), and that the constitutional provision "was intended to effectuate a State policy requiring that each banking corporation operate as an independent unit" (p. 36).[11]

Bank of America, located in California, which for years maintained representative offices in New York, Chicago, and Washington, D.C., and Riggs National Bank of Washington, D.C., which once maintained its entire trust department in a separate building. Even more importantly, virtually all money-center banks now have officers whose primary function is to travel and solicit new business, or service existing business, from major national corporations.

[10] "Such body corporate [with banking and discounting privileges] shall not be authorized to engage in business at more than one place which shall be designated in its charter."

[11] This ruling is squarely contrary to the holding of the federal courts that chain banking is not impermissible branching insofar as national banks are concerned. *First National Bank in Billings v. First Bank Stock Corp.*, 306 F. 2d 937 (9th Cir. 1962); *Camden Trust Co. v. Gidney*, 112 U.S. App. D.C. 197, 301 F. 2d 521, *cert. denied*, 369 U.S. 886 (1962).

Therefore, it violated the Constitution for one bank to organize separate corporate bodies and then dominate or control them "to the extent of indirectly engaging in banking business through another ostensibly independent bank" (p. 36).[12] When this interpretation is correlated with the *Dickinson* decision, it is clear that a state Banking Commissioner could, by departmental order as distinguished from legislative fiat, prohibit a registered bank holding company from owning interests in more than one bank. This would defeat the Congressional intent and seriously jeopardize the authority of federal control over registered bank holding companies.

The disparity in treatment that could ensue is also illustrated by the fact that while local commissions interpret state laws in Florida and Georgia as prohibiting the operation of armored car services by banks, California law *compels* the use of such services to and from certain depositors.

Thus, Section 53739 of the California Government Code reads: "*Expense of Transporting Money.* The depositary shall bear the expenses of transportation of money to and from the depository." Section 53630 (b) provides: "(b) 'Depository' means bank in which the moneys of a local agency are deposited." And Section 53630(a) reads: "(a) 'Local agency' means county, city, municipality, or other public or municipal corporation." Under these sections, it becomes mandatory for banks to provide armored car service for the trans-

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[12] See also the letter from the Attorney General of Texas to the state Banking Commissioner (Opinion No. WW-159) dated July 3, 1957, and *Texas ex rel. Falkner* v. *National Bank of Commerce*, 290 F. 2d 229 (5th Cir.), *cert. denied*, 368 U.S. 832 (1961).

portation of money to and from the offices of the local agencies defined in the statute.[13]

These various rulings at the state level demonstrate a number of facts relevant to an interpretation of the federal statute. One is the extraordinary variance in treatment that national banks will face if the Fifth Circuit's opinion is affirmed—a variance perhaps best illustrated above by some states attempting to prohibit what the State of California specifically requires. Another fact, evidenced by the swiftness with which many state officials have moved to cut off a number of vital banking services, is that the national banks will literally be at the mercy of the states if *Dickinson* becomes binding federal law, with a concomitant loss of service and facilities to customers across the country. And still another fact is that the national banks would not necessarily be protected even by state statutes or judicial state court interpretations, for *Bank of Cornelia* shows how federal courts would feel themselves bound, in the absence of specific state court rulings, by the decisions of a single state administrative official. This kind of power in the hands of state officeholders could not conceivably have been the intent of Congress in fashioning a federal statute to govern national banks.

It must be emphasized in this regard that even disregarding the varying interpretations of branch banking that have been or may be rendered by state officials, the fact is that state statutes themselves vary drastically in their treatment of the subject. As pointed out above, some states, like Florida, Georgia, Texas

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[13] Amicus Bank of America National Trust and Savings Association, pursuant to these sections, regularly provides armored car messenger service to and from these local agencies.

and Illinois, prohibit branch banking altogether. Others allow branches but have disparate requirements in establishing a branch.

For example, Connecticut allows branches, with the approval of the state Commissioner, to be operated by a bank (with a combined capital and surplus of at least $1,000,000) within the same town as the main office or within other towns where no state or national banks are located, assuming a number of conditions are met. Conn. Gen. Stat. (as amended), §§ 36-59. Michigan allows branches generally within the same city as the main office or within a city or village in the same or contiguous county not more than twenty-five miles from the principal office. *Compiled Laws of Mich. of 1948* (as amended), §§ 487.34, 487.34a, 487.34b. New Hampshire allows branches to be established by a bank (with no restrictions on the amount of capital), after a public hearing, in the same town as the principal office, in any contiguous town with no other banks, and in any non-contiguous town within fifteen miles of the principal office if no other bank is within ten miles of the proposed branch. N.H. Stat. §§ 384-8.1, 384.B:2.

The Code of Vermont, on the other hand, allows a bank, with no restriction on capital, to establish branches after a public hearing if the branches will "promote the general good of the state," so long as they do not have certain anti-competitive effects, harm depositors, etc. Vt. Code Title 8, §§ 501-601a. The Massachusetts statute limits branches to a single county. Mass. Gen. Laws, Ch. 172 § 11.

The number of branches operated by any one bank—and therefore the complexity of the problem—also vary widely from bank to bank. Among the Amicus banks,

for example, First Union National Bank of North Carolina has 117 offices in fifty-eight communities in North Carolina; National Bank of Detroit operates 100 banking offices, including one in London, England; The State National Bank of Connecticut has thirty-four full-service offices located in twenty-one communities and a Computer Center housed in a branch in Fairfield; Howard National Bank and Trust Company has thirteen banking offices in Vermont; Indian Head National Bank has one main office and two branches, all in New Hampshire; whereas Continental National Bank of Fort Worth and First Security National Bank of Beaumont each has only one office. Most banks serve only one state, but Exchange National Bank of Chicago, by way of example, operates four offices that cover six states, so that the laws of *each* state as to what constitutes branch banking would come into play.

The Amicus banks stress to the Court that these varying activities, practices, statutes and interpretations spell nothing but trouble in the administration of federal banking laws throughout the country. As pointed out by the Solicitor General in his Petition for a Writ of Certiorari (p. 12), "It is inconceivable that, without expressly so providing, Congress could have intended that the lawfulness of all these functions [performed by banks] turn on state definitions of 'branch'."

It was well settled, at least until the *Dickinson* opinion, that the National Bank Act constituted "* * * by itself a complete system for the establishment and government of national banks * * *." *Cook County National Bank* v. *United States,* 107 U.S. 445, 448 (1883). Thus, the determination of what is a "rat-

able" distribution of the assets of an insolvent national bank under 12 U.S.C. § 194 is "one of federal law." *American Surety Co.* v. *Bethlehem National Bank,* 314 U.S. 314, 316 (1941); see also *D'Oench, Durme & Co., Inc.* v. *FDIC,* 315 U.S. 447 (1942). And in *Downey* v. *City of Yonkers,* 106 F. 2d 69, 73 (2d Cir. 1939), *aff'd,* 309 U.S. 590 (1940), the court held: "It is well settled that the distribution of assets of an insolvent national bank is governed by federal law and that state laws which attempt to create preferences which arise at the time of insolvency are to be disregarded." When a policy is involved upon which Congress has legislated, the validity of a note given to a national bank to purchase stock, "* * * though left by the statute to judicial determination * * * involves decision of a federal, not a state question." *Deitrick* v. *Greaney,* 309 U.S. 190, 201 (1940). Of particular significance is Judge Learned Hand's opinion for the Court in *FDIC* v. *Tremaine,* 133 F. 2d 827 (2d Cir. 1943). The opinion states that in 1930,

> * * * avowedly in order to enable national banks to compete with state banks for the deposit of the "public money" of the states in which they did business—§ 90 was amended by providing that a national bank might also, "upon the deposit with it of public money of a State or any political subdivision thereof, give security * * * of the same kind as is authorized by the law of the State * * * in the case of other banking institutions in the State. [133 F.2d at 828-829.]

Notwithstanding that the statute involved was enacted "* * * to enable national banks to compete with state banks * * *," and notwithstanding that the question

was what constituted "public money" of a state or political subdivision thereof, the court held that:

> that phrase was to be determined as a federal question: i.e., that Congress did not mean to make it dependent upon whether the deposits secured were deemed "public money" according to the law of the State where the security was given. [133 F.2d at 829.]

These cases involving the National Bank Act are merely applying familiar doctrine that "* * * a federal statute may not be set at naught, or its benefits denied, by state statutes or common law rules." *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176, (1942). National banking is an area "* * * within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Id.* at 176. In short, words appearing in a federal statute, whether or not having a fixed meaning under state law, must be interpreted according to federal law. *New York* v. *Feiring,* 313 U.S. 283, 285 (1941). *Dickinson* held otherwise.[14]

The Amici Curiae national banks fully agree with and adopt as their own the arguments of petitioners

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[14] It should be noted that the Fifth Circuit decision went off on a matter hardly discussed in argument. Both parties and the court, prior to the decision, treated the case as one involving the question whether armored car messengers received "deposits" within the meaning of § 36(f) of the federal Act. In fact, the reply brief of the Florida Commissioner stated that "* * * the basic decisions regarding branching, *including the definition thereof,* were made by Congress in the 1927 McFadden Act" (p. 15; emphasis in original).

relating to the legislative history of the national banking laws, judicial precedents in addition to those cited above, and all of the reasons why branch banking must have been federally defined and thus federally imposed on the states. But the facts cited in this brief show in addition that if national banks are to continue to serve the public, they cannot be left to the vagaries—and restrictions—of state interpretation.

We respectfully urge the Court to reverse the Fifth Circuit judgment and restore the orderly administration of the federal banking laws.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 777

THE FIRST NATIONAL BANK IN PLANT CITY,
PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the court of appeals (A. 391–409) is reported at 400 F. 2d 548. The opinion of the district court (A. 365–374) is reported at 274 F. Supp. 449.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1968 (A. 390). The petition for a writ of certiorari in No. 777 was filed on November 25, 1968. By order of December 9, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari in No. 932 to and including January 10, 1969 (A. 410), and on that date the petition was filed. Certiorari was granted in both cases on February 24, 1969, and the cases were consolidated (A. 411). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, for purposes of the reference in 12 U.S.C. 36 to state law as determining whether a national bank may establish a "branch", the threshold determination of what banking activities amount to a "branch" is governed by state law rather than federal law based upon the definition of "branch" in the same section.[1]

STATUTES INVOLVED

The following statutory provisions are set forth in the Appendix hereto: 12 U.S.C. 36, formerly Section 7 of the McFadden Act of 1927, 44 Stat. 1228–1229, as amended (*infra*, pp. 47–51); the original text of Section 7 of the McFadden Act (*infra*, pp. 51–53); Section 659.06 of the Florida Statutes (*infra*, pp. 53–54).

[1] If this threshold matter is governed by federal law, then the further question arises whether the banking activities involved in this case constitute "branching" within the federal definition (see Petition, No. 932, p. 15 n. 15). That question is treated as point two of this brief, *infra*, pp. 42–44, and is discussed more extensively in the brief for petitioner First National Bank.

STATEMENT

1. Section 36 of Title 12 of the United States Code generally prescribes the conditions under which a national bank may retain or establish and operate a "branch or branches". Under subsection (c), new "branches" may be established if the Comptroller of the Currency of the United States approves and if state law would authorize a state bank to establish and operate such a branch. In subsection (f) of Section 36, Congress has specified that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

2. In 1966, the First National Bank in Plant City (Florida) began the operation of an armored car messenger service to and from its banking house, and established an off-premises secured receptacle from which the messenger could pick up items left by customers. The secured receptacle is located in a shopping center one mile from the banking house, and is available for use by persons maintaining accounts with the bank (A. 94). The messenger service also transports cash and checks directly from customers' places of business to the bank, where the funds are credited to the customers' accounts, and delivers to the customers, upon their prior request, cash that has been withdrawn from their accounts (A. 89, 95–96, 100–101, 108–109, 178–179).

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Before inaugurating these services, First National had been advised by the Comptroller of the Currency of the United States (hereafter "U.S. Comptroller") that a national bank may furnish an armored car service if it complies with the provisions of Paragraph 7490 of the Comptroller's Manual for National Banks, which authorizes such service if it is agreed "that the messenger is the agent of the customer rather than of the bank." (A. 378–382).[2] The bank was also informed that it could establish a receptacle in which customers would place night bags to be picked up by messenger, provided that the receptacle

> contain[s] thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice may also advise that adequate insurance coverage will be provided and proper security measures taken. [A.21–22.]

First National accordingly established the armored car messenger service and off-premises receptacle on the terms specified by the U.S. Comptroller (A. 82–83).

3. Shortly before First National instituted its new services, the respondent, Fred O. Dickinson, Jr., Comptroller of the State of Florida (hereafter "Florida Commissioner")[3] wrote to the bank that he would

[2] The Federal Reserve Board has adopted a similar ruling. See 12 C.F.R. 208.110. With the approval of the Board of Governors of the Federal Reserve System, state member banks can branch on the same terms and conditions as national banks. See 12 U.S.C. 321.

[3] The Florida Comptroller is *ex officio* the state banking commissioner.

consider the armored car service and off-premises receptacle violative of the Florida law prohibiting branch banking; he therefore warned the bank to cease and desist (A. 23–24). First National then brought this action against the Florida Commissioner seeking declaratory and injunctive relief. The U.S. Comptroller intervened on the side of First National while several state banks intervened to support the Florida Commissioner.

The district court held that in 12 U.S.C. 36(f) Congress has itself provided the "exclusive definition" of what will constitute a "branch" of a national bank (A. 371). The court received voluminous depositions and numerous documents; considering these and the "unambiguous contract" (*ibid.*) between First National and its customers, it found that the provision of the armored car service and secured receptacle did not constitute receiving deposits or paying checks and thus did not amount to "branching" within the meaning of the federal definition. Accordingly, the court concluded that the Florida branching statute, Fla. Stat. 659.06(1), on which the Florida Commissioner had relied in objecting to First National's services, "is not operative or controlling in this instance" (A. 371). It went on to hold that the U.S. Comptroller's authorization of such off-premises activities was permissible under the National Bank Act (A. 372–373) and entered judgment against the Florida Commissioner (A. 376–378).

The court of appeals reversed (A. 391–409). It termed "indefensible" any inquiry into whether First National's activities amounted to the establishment of

"offices or agencies, where, as specified in Section 36(f), 'deposits are received, or checks paid, or money lent.'" (A. 400). Subsection (f), the court stated, is "hardly adequate" to determine what is a "branch" (A. 406), and the court would not "tread the twisting paths of agency and contracts urged upon us in this case" (A. 408). Instead, in the belief that "radiations" from this Court's decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, made state norms pervasive, the court held that Florida's concept of "branching" would be "operative and controlling" (A. 392). To hold otherwise, it said, "would severely challenge the policy of 'competitive equality' which the Supreme Court has so recently established [in *Walker Bank*]" (A. 407). It acknowledged that "[t]o be sure, national banks may well fear the authority of state comptrollers to make extreme use of this same defining process, but their recourse must be to Congress which legislated 'competitive equality,' not to the courts who must follow it" (A. 407–408).

A certain amount of confusion is introduced into the court's opinion by its substantial reliance upon a lengthy quotation (A. 401–406) from *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash.). In that case, Judge Lindberg had construed Section 36(f) as providing "a partial definition or a description of what *may be* included within the term 'branch'" (A. 403, italics in original). He termed it a "broad, functional measuring gauge of what a branch may be", for "determining *prima facie* if the supplementing state

branching law should come into play" (*ibid.*). Only when there is some "prima facie" showing that the *federal* criteria have been met did he consider that "state law takes over and may further define 'branch' in such a way as to comport with the state's banking policy" (*ibid.*). The context of his discussion shows that he was concerned not with the authority of state law to *expand* the coverage of the term branch for purposes of Section 36(c) but rather to constrict it.[4] Contrary to this approach, however, which it purported to follow, the court below made no examination at all to determine whether First National's activities

[4] Thus, Judge Lindberg viewed the *Valdosta Bank* case (*Jackson* v. *First National Bank of Valdosta*, 349 F. 2d 71 (C.A. 5)) as imposing on the U.S. Comptroller the obligation to inquire whether, by virtue of state regulations, a new bank facility otherwise within the ambit of the federal definition (and thus prohibited) would for state law purposes be considered merely "an expansion of the existing facility" (and thus permitted) (A. 403).

Judge Lindberg concluded (A. 404) that "[t]he test of 'branchness' in this situation is therefore twofold—(1) Does the facility fit the broad functional definition laid down by Congress in Section 36(f), *and if so*, (2) Does the state law add any [sic] more refinements to the definition?" (Emphasis added.) After analysis of the functions performed by the banking facility involved, Judge Lindberg found that checks were paid "within the meaning of section 36(f)" and that the facility constituted an "additional office" (A. 404–405). He concluded that the "facility is therefore a 'branch' within the meaning of the federal statute (12 U.S.C. § 36(f))" (A. 405). Compare *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 19 Utah 2d 18, 425 P. 2d 414. Then, and only then, did he hold that "[f]rom this point forward, the state statutes and their interpretation as applied to state banks and their branches become the controlling law in determining whether this facility is to be considered a branch or not" (*ibid.*).

met what Judge Lindberg had called the "broad functional definition" of a "branch" in 12 U.S.C. 36(f) (A. 404). Rather, it relied entirely on state law.

Since the pertinent state statute (Fla. Stat. 659.06 (1)(a), pp. 53–54, *infra*) was unclear and had not yet been interpreted by a state court, the court of appeals accepted the Florida Commissioner's cease-and-desist letter as dispositive, simply noting that his conclusion "appears consistent with the policy of the state statute" (A. 408). In light, however, of litigation pending in the Florida courts on the interpretation of the Florida statute,[5] the court observed that the Florida Commissioner's views might not be the "final" interpretation of the Florida law. Accordingly, the case was ordered remanded to the district court for entry of a conditional decree in the Florida Commissioner's favor, but without prejudice to reconsideration if "Florida law is ultimately determined to be different than here expounded" (A. 409).

SUMMARY OF ARGUMENT

I. Set forth in 12 U.S.C. 36 are the conditions under which national banks "may * * * establish * * * branches". One condition is that a "branch" may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch. 12 U.S.C. 36(c). But this condition, like the other conditions of 12 U.S.C. 36, concerns only the activities of national banks which constitute the establishment, retention, or operation of

[5] *Dickinson* v. *Tallahassee Bank and Trust Co.*, 2d Jud. Cir., Leon County No. 68–30.

"branches". And 12 U.S.C. 36(f) specifies that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent." The court below erred in ignoring this sufficient and exclusive federal functional definition in favor of a supposed overriding principle of "competitive equality" between national and state banks, which it thought compelled resort to state law for determination of the threshold question whether a "branch" is involved under the particular facts.

Section 36 of Title 12 embodies the provisions of Section 7 of the McFadden Act of 1927. When Congress passed that statute, for the first time allowing national banks to operate "branches", it was concerned with *expanding* the ability of national banks to compete effectively with state banks. In no sense was there any intention to cut back on other off-premises services—including armored car service—historically rendered by national banks, but which did not amount to branching, as Congress understood, used, and defined that term.

The use of the phrase "competitive equality" in the legislative history of the McFadden Act and in this Court's opinion in *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 385 U.S. 252, does not warrant the court of appeals' elevation of that phrase to an all-pervasive dogma. To be sure, Congress indicated that national banks were to be accorded competitive equality, "insofar as branch banking was concerned" (385 U.S. at 261), but this proposition

does not justify the leap to the conclusion that Congress abdicated to the states the determination of what constitutes branch banking and is thus subject to state law. The *Walker Bank* case involved questions in the application of state law to facilities that were unquestionably "branches", and this Court's opinion there offers no support for the decision below on the distinct, preliminary question of what constitutes a "branch". Moreover, the goal of equality that the court of appeals sought to serve is chimerical; Congress' selective references to state law in the national bank legislation do not point toward such a goal, which would be inconsistent with, and impossible under, our dual system of state and national banks.

The structure of Section 36 as a whole, as well as its background and legislative history, indicate clearly that subsection (f) was intended to establish an exclusive federal definition of what constitutes a national bank "branch" subject both to the subsection (c) incorporation of state law and to the provisions of other subsections that have no relationship whatever to state norms. Certainly Congress did not intend that varying state conceptions as to what is a "branch" should determine the applicability of these other purely federal provisions, and it would be anomalous to suggest that the meaning of the term should vary within Section 36. Rather, it is clear that Congress used the word "branch" with a consistent meaning *throughout* the section as a whole, and set forth that meaning in the plain language of subsection (f).

The lower federal courts and the executive agencies concerned have consistently interpreted Section 36(f) as setting forth a workable *definition* of "branch", not a merely superfluous statement of the obvious, as the court below viewed it. The reading given by these other authorities is amply supported by the long-established principle that state law cannot intrude into regulation of national banks—or any similar regulatory scheme—where a federal statute addresses itself to the question, absent some explicit evidence, lacking here, that state law was adopted or preserved on the question. Despite the objections of the court below, there is nothing vain about defining "branch" in terms of the "life-blood" functions of banking; it was only these activities that Congress was concerned about regulating through a federal branch-banking statute. Other courts have had no difficulty in applying Section 36(f) as a meaningful standard for determining the coverage of the Act.

The soundness of according Section 36(f) its natural reading as a controlling definition is confirmed by examination of the alternatives. The effect of the ruling below would be to allow the states and their state banking authorities—without a shred of evidence that Congress so intended—to use the open-ended power to define "branch" to bring countless activities of national banks under state regulation. Such a dislocation of control conflicts with the original purpose and continuing theme of maintaining a separate system of national banks, and is hardly supported by anything Congress has said or done in this statute. More-

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over, this fear cannot be termed speculative, for banking authorities in a number of states have already made use of an asserted power to treat a variety of off-premises services rendered by national banks as illegal "branches".

From an administrative standpoint too, the decision below can be seen to be indefensible. Congress has placed the Comptroller of the Currency of the United States in charge of chartering and regulating national banks, and indeed Section 36(c) requires only his approval to establish a "branch". But the Comptroller could not effectively rule either on the lawfulness of services he considered branching or on the permissibility of other off-premises services not so viewed, if his conclusion were subordinated to the vagaries of state administrative interpretation. It has long been settled, and indeed is not disputed here, that national banks need not apply to state banking administrators for permission to engage in any activities. Yet as a practical matter, national banks would find it necessary, under the regime decreed by the court of appeals in this case, to secure just such approval before they could institute new service programs.

II. Applying the federal standards under Section 36(f), the district court properly found, on the basis of the extensive testimony and documents before it, that the activities in question in this case do not amount to "branching" and thus that state law is not made applicable to them by Section 36(c). As is shown in greater detail in the brief for the petitioner national bank, the messenger service and receptacle

do not, in light of the governing contractual relationships, involve either the "receipt" of deposits or the "payment" of checks.

Accordingly, the relief granted by the district court should be reinstated.

ARGUMENT

I. FEDERAL LAW GOVERNS THE THRESHOLD DETERMINATION WHETHER THE ACTIVITIES OF A NATIONAL BANK AMOUNT TO OPERATION OF A "BRANCH", THE PERMISSIBILITY OF WHICH WOULD THEN BE CONTROLLED BY STATE LAW

In the words of the court below, the controlling issue in this case is one of "choice of law" (A. 396): Does state or federal law govern the inquiry whether the First National Bank's receptacle and messenger service constitute a "branch" as that term is used in the National Bank Act? It is undisputed that if these off-premises activities do constitute "branching", then under 12 U.S.C. 36(c) state law determines whether they are lawful.

The provisions that permit "branches" by national banks in accordance with state law were first introduced into the National Bank Act by Section 7 of the McFadden Act of 1927 (A. 397). The McFadden Act included in its subsection 7(f) the further provision, codified as 12 U.S.C. 36(f), that "as used in this section" the term "branch"

> shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * *at which deposits are received, or checks paid, or money lent* [emphasis added].

Nevertheless, the court below refused to hold either that these three "life-blood functions of banking" (A. 407) delineate the activities Congress was speaking about as branching, or that any additional "flexibility" in the application of the statute should come from the "federal common law of branching" (*ibid.*). Instead, the court insisted on "recourse to state law" as if subsection (f) did not exist.

In reaching this conclusion, the court indulged in an apparent non-sequitur. The major premise is indisputable: in Section 36(c) of the National Bank Act, Congress has made the judgment that national banks will be permitted to establish branches whenever, wherever and however state banks are authorized by state law to do so. See *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 385 U.S. 252, 261–262. The court's minor premise, when properly understood, is also sound: Congress elected to key national bank branching to state law in order to place the national and state banking systems in a status of "'competitive equality' insofar as branch banking was concerned". See *Walker Bank, supra,* 385 U.S. at 261. But these premises do not require the conclusion that there is an overriding principle of "competitive equality" that limits all off-premises services of national banks to those that state banks can provide. Nor, more particularly, do they require the conclusion reached by the court of appeals that—notwithstanding the explicit definition in Section 36(f) of what "branch" means throughout the section—Congress must also have intended that variant state norms govern the threshold question of whether

the national bank's activities are to be considered a "branch" at all.

On the contrary, as we shall show, these inferences are manifestly erroneous. The decision of the court below conflicts with the consistent approach of other courts and depends upon *Walker Bank* for support the case does not lend. The decision critically misapprehends the historical context of the reference to state law in Section 36(c), ignores the pertinent legislative history, does violence to the structure of Section 36 as a whole, and erodes the century-old policy of narrowly construing the authority of state officials to regulate the activities of national banks.

A. THE MCFADDEN ACT WAS DESIGNED NOT TO REDUCE NATIONAL BANKS TO EXACT FACSIMILES OF STATE BANKS BUT SIMPLY TO INCREASE THEIR BRANCHING POWERS TO THE LEVEL OF "COMPETITIVE EQUALITY" WITH STATE BANKS

The court of appeals arrived at its decision by a process of deduction from what it supposed to be an immutable and all-encompassing dogma of "competitive equality" between national and state banks in the matter of branching. Indeed, it stated the view that "Congress * * * legislated 'competitive equality'" and "the courts * * * must follow it" (A. 408). The phrase is a catchy one, and it appears repeatedly in the legislative history of the McFadden Act and in this Court's most recent branching opinion, *Walker Bank, supra.* But undiscriminating use of the equality slogan is no substitute for careful reading of the statute in the light of its background and legislative history, which show that what Congress intended was not to *restrict* the operations of national banks to

identity with those of state banks in all respects, but rather to *liberate* national banks from prior restrictions that had placed them at a competitive disadvantage.

1. Until 1927, when the McFadden Act was passed, national banks lacked authority to establish and operate branch offices for the conduct of general banking business. See 29 Ops. Att'y Gen. 81, 86 (1911); 34 Ops. Att'y Gen. 1, 4 (1923). With the sanction of this Court, national banks had, however, engaged from the earliest times in other more limited off-premises activities related to the efficient discharge of their business. See, *e.g., Bank of Augusta* v. *Earle,* 13 Pet. 519. Indeed, in 1870, the Court upheld the power of a national bank to permit its cashier to certify checks elsewhere than at the banking house, explaining:

> * * * The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. * * * [*Merchants' Bank* v. *State Bank,* 10 Wall. 604, 651.]

Included among such off-premises services performed by national banks before the McFadden Act, and not considered the operation of "branches," was the furnishing of armored car messenger services, the very activity involved in the present case.[6]

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[6] See 71 Bankers' Magazine 1017 (1906); 81 Bankers' Magazine 739 (1910); 83 Bankers' Magazine 350b, 732, 805 (1911); 84 Bankers' Magazine 746 (1912).

In 1923, the Attorney General advised the Comptroller of the Currency, the officer charged by Congress with the regulation of national banks, that in his opinion the absence of authority for national bank branching would not prevent national banks from opening additional offices "for the transaction of business of a routine character" such as "the receipt of deposits and the cashing of checks for their customers"; the Attorney General reasoned that these activities would not amount to the "general banking business." 34 Ops. Att'y Gen. 1, 3, 5. A year later, however, this Court indicated that this ruling had gone too far in seeking to expand the off-premises functions that national banks might perform. *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 656, 658 n. 1. Instead, the Court specifically endorsed the 1911 opinion of Attorney General Wickersham which, while less expansive, had nonetheless expressly recognized that there is "a wide difference" between "the right to establish branch banks at which a general banking business is carried on" and the mere "appointment of agents to receive and collect money and forward it to the bank." 29 Ops. Att'y Gen. 81, 90. This Court's decision concluded further that state anti-branching laws could validly be applied to national banks since there was no paramount federal law on the question and no impairment of the fundamental purposes of national banks would result.

2. It was against this backdrop that Congress began its consideration of what was to become known as the McFadden Act. This Court's decision in the *Missouri* case was undeniably the catalyst for the meas-

ure. One of the chief sponsors of the bill, Representative Wingo, explained that the Court's decision, coupled with the two opinions of the Attorneys General, had "left uncertain the question of branches or 'financial comfort stations' authorized" by the Comptroller.[7] It was the Banking and Currency Committee's view, therefore, he explained, that "Congress should by affirmative action decide what are the rights of national banks to engage in branch banking."[8]

Friend and foe alike voiced explicit awareness that the bill reflected a determination to *expand* the permissible functions of national banks by, as one critic put it, "legalizing for the first time branch banking by distinctly national banks * * *."[9] One opponent of the bill objected that the "chief purpose of this legislation is the extension of the privilege of branch banking."[10] Indeed, another vocal critic, noting the rather brief interval between the *Missouri* decision and the submission of the McFadden bill, objected to the speed with which "the comptroller's office had the case on appeal ready for Congress."[11]

But while the *Missouri* decision was the immediate occasion for consideration of the bill, the underlying

[7] 66 Cong. Rec. 1777 (1925). See, generally, H. Rep. No. 583, 68th Cong., 1st Sess. (1924); H. Rep. No. 83, 69th Cong., 1st Sess. (1926); S. Rep. No. 473, 69th Cong., 1st Sess. (1926).

[8] 66 Cong. Rec. 1777 (1925).

[9] 67 Cong. Rec. 2843 (1926) (Cong. Nelson). See, also, 67 Cong. Rec. 3247 (1926) (Cong. Cannon).

[10] 67 Cong. Rec. 2850, 2852 (1926) (Cong. Steagall). See, also, 67 Cong. Rec. 2860 (1926) (Cong. Stevenson); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842, 845 (D. S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970.

[11] 67 Cong. Rec. 2842 (1926) (Cong. Nelson).

reasons for it went far deeper. In contrast to the absence of any authority for national banks to establish branches, the laws of many states permitted state-chartered banks to branch. In those states, national banks were "greatly handicapped" [12] by their inability to branch, and the welfare of the national banking system was endangered by the great number of national banks leaving the system to secure state charters.[13] The bill therefore sought to enlarge the powers of national banks in order to give national banks "substantial equality with State banks [under] normal competitive conditions." [14] In explaining why he thought it necessary to increase the authority of national banks to assure them some semblance of "competitive equality", Representative McFadden argued:

> Having complete control of its [Congress's] creatures, the national banks, it can enlarge or restrict at will the powers of such banks for any purpose. Therefore when we are faced with the prospect of a harmful weakening of the national system through the competition of State banks, the logical and reasonable remedy is by the exercise of Federal sovereignty in the only way it should be used, i.e., *by granting its creatures, the National banks, power to compete favorably with State banks.* * * * [66 Cong. Rec. 1646 (1925); emphasis added.] [15]

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[12] 67 Cong. Rec. 3232 (1926) (Cong. Williamson).

[13] 66 Cong. Rec. 1625 (1925) (Cong. Celler).

[14] 67 Cong. Rec. 3232, 3233 (1926) (Cong. Williamson).

[15] *Accord*, 66 Cong. Rec. 1645 (1925); 66 Cong. Rec. 1767 (1925). Compare 66 Cong. Rec. 1764 (1925) (Cong. Lozier).

In 1933, Congress deemed it appropriate to make a "larger experiment with branch banking" and removed the McFadden Act's restriction on national bank branching to branching with-

Another theme also runs through the discussion of the bill. Congress was concerned not only about increasing the viability of the national bank system by allowing its members to open "branches" when state banks could; in addition, the bill sought more generally to enlarge the opportunity of national banks to render the most useful service to their customers. Thus, Representative McFadden explained that

> * * * the main purpose of the bill is to remove certain outstanding handicaps from the national banks which now stand in the way of *carrying on a full-fledged and efficient modern banking business.* * * * [67 Cong. Rec. 2830 (1926); emphasis added.]

The House was frequently reminded that "there is another factor involved besides the question of meeting the competition of [state] banks, and that is the question of service."[16] One of the main purposes of the bill, he remarked, "is a recognition of branch banking as a service proposition * * *."[17]

Thus the McFadden Act was designed to promote, not retard, the competitive position of national banks vis-a-vis their state counterparts. Nowhere in the

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in the limits of the city in which it was established, if state banks could branch outside the city. See S. Rep. No. 77, 73d Cong., 1st Sess., p. 11 (1933). Senator Glass, in reporting the bill that was finally enacted (48 Stat. 189, 190), summed up (77 Cong. Rec. 3726 (1933)): "We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. * * *"

[16] 66 Cong. Rec. 1778 (1925) (Cong. McFadden).

[17] 66 Cong. Rec. 1767 (1925); accord, 66 Cong. Rec. 1645 (1925).

history of this legislation is there any hint that Congress objected to the rendering of off-premises services by national banks, that it intended to cutback on those activities—including armored-car messenger service—which for decades had been considered lawful ancillary activities, or that it intended to give state authorities power to control such services.

This Court has observed that the federal government "is a rival chartering authority for banks," and that in order to assure that "these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority." *Franklin National Bank of Franklin Square* v. *New York,* 347 U.S. 373, 375. That manifestly, was the intent of Congress in 1927, an intent that the approach of the court below misconceives and frustrates by converting the "competitive equality" slogan into a device for restricting the services that national banks may provide.

3. Just as the court of appeals was mistaken in its view that the McFadden Act "legislated 'competitive equality'" (A. 408), so also did it misinterpret this Court's opinion in *Walker Bank* as having "established" such a general "policy" (A. 407). *Walker Bank* held only that the enabling provisions of 12 U.S.C. 36(c) did not permit national banks to establish what all acknowledged quite soundly would be new "branches" under circumstances where state banks would not be allowed to establish similar "branches." The only question before the Court was whether subsection (c) absorbs state law to the extent

that it determines not only whether and where national banks may establish "branches" but also by what method; it was only in this context that the Court spoke of "competitive equality," and that only "insofar as branch banking was concerned", 385 U.S. at 261. It does not "establish" any general principle of competitive equality that has any applicability beyond the four corners of subsection (c), which of course comes into play only after it is determined that "branch banking" is in issue. *Walker Bank* expressed no view whatever on the wholly separate question of what constitutes a "branch," and thus is in no way decisive of the present case.

4. Any goal of across-the-board competitive equality would be fundamentally inconsistent with the existence of the dual banking system, which presupposes differences between national and state banks.[18] Had Congress intended such uniformity, it no doubt could have achieved it by a sweeping incorporation of state law into the law governing national banks, but it did not do so. Rather, Congress has referred to state law narrowly, explicitly, and selectively.[19] The result is that national banks have relative disadvantages in some areas of activity, and advantages over state banks in others.[20] Thus, the general prin-

[18] See Note, *Branch Banking: The Current Controversy*, 16 Stan. L. Rev. 983, 990–991 (1964).

[19] See *e.g.*, 12 U.S.C. 24 Eighth, 51, 85, 90, 92a, 214c, 371, as well as the disscussion of Section 7 of the McFadden Act, *infra*.

[20] For example, under Section 659.16 of the Florida Statutes, state banks may maintain their legal reserves in interest-bearing obligations of the United States or in obligations guaranteed by the United States, whereas national banks, under 12

ciple that the court of appeals tried to apply is non-existent.

B. SECTION 36(f) ESTABLISHES AN EXCLUSIVE FEDERAL DEFINITION OF "BRANCH"

The language and structure of Section 36 of Title 12 have—insofar as is pertinent to the problems of this case—remained substantially unchanged since their origin in Section 7 of the McFadden Act.[21] The introductory paragraph of that section provides that:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following * * *.

U.S.C. 461 *et seq.* and 12 C.F.R. 204, must maintain their reserves in the form of non-income producing deposits at the Federal Reserve Bank. Similarly, under Section 659.17 of the Florida Statutes a state bank may lend a single customer up to 10% of capital and surplus, unsecured, and up to 25% of capital and surplus on a secured transaction, whereas a national bank, under 12 U.S.C. 84, is limited to 10% of capital and surplus regardless of security. Also, national banks, as this Court has only recently reiterated, enjoy unique immunity from state sales and use taxes on tangible personal property. *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339. Compare *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373.

[21] Over the years there have been amendments to subsection (c) to expand the geographical limitations upon branching otherwise consistent with state law; originally branches were permitted only within the national bank's home city; in 1933 statewide branching was first permitted, 48 Stat. 189; and in 1935 seasonal agencies were authorized in resort areas subject to certain limitations, 49 Stat. 708. In addition, the original minimum population requirement for establishment of a branch in subsection (d) was superseded by minimum capital requirements, 48 Stat. 190, which were subsequently amended, 66 Stat. 633.

It is thus made clear at the outset that if there is no "branch" as the term is used in Section 36, the various following subsections and their underlying policies are not to apply. Subsection (a) proceeds to deal with the conditions upon which a national bank may retain and operate a branch bank it had in operation at the time of the Act's enactment. Subsection (b) governs the retention and operation of branches by a national bank resulting from consolidation or from conversion. Subsection (d) imposes minimum capital requirements for each branch, and subsection (e) requires the consent of the Comptroller of the Currency before a branch can be moved from one location to another. Subsection (g) covers branches in foreign countries, dependencies, or insular possessions of the United States. And subsection (h) defines the term "state bank" as used in the statute.

The two subsections primarily involved in this litigation are subsections (c) and (f). Subsection (c) sets forth the conditions under which national banks may establish and operate new domestic branches; the condition pertinent to this case is that such a branch may be established only if state law would permit a state bank to branch in the circumstances. In subsection (f), Congress explained what it meant throughout Section 36 when it spoke of "branches", providing that—

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which

deposits are received, or checks paid, or money lent.

We believe that this language—which has remained unchanged since the original 1927 enactment—provides a sufficient and exclusive federal definition for determining whether particular off-premises services constitute a "branch" and thus are subject to subsection (c). And the structure of Section 36 as a whole, its background and legislative history and the decisions of other courts all support this interpretation.

1. In its straining to apply a monolithic principle of equality, the court of appeals ignored the natural meaning of the language that Congress used in subsection (f). The court brushed the quoted language aside as "hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the lifeblood functions of banking" (A. 406–407). In effect, therefore, subsection (f) was treated as a superfluous abstract essay. We are at a loss to understand why it should be inconceivable that Congress could have meant to cover as "branches" only those facilities which relate most intimately to the traditional, bed-rock functions of banks. On the contrary, that is just what one would naturally expect. Whether or not a "branch bank" exists would logically depend on the presence or absence of the three fundamental banking activities—the receipt of deposits, the payment of checks and the making of loans.[22]

[22] The formulation in Section 36(f) has been found sufficiently manageable and informative as a definition that it has been copied by at least one *state*, where it has been satisfactorily applied as the test for whether a state bank's off-premises activ-

The definitional nature of subsection (f) is highlighted by the fact that the standards set forth do not relate solely to the subsection (c) incorporation of state law with respect to the establishment of new branches. In addition, these tests also govern matters as to which state law has no pertinence at all: the retention of "branches" in operation at the time of enactment of the McFadden Act (subsection (a)); the population requirements for municipalities having "branches" (subsection (d) as found in the McFadden Act);[23] the requirement that the U.S. Comptroller (alone) consent to a national bank's change in the location of a "branch" (subsection (e)); and the establishment of "branches" abroad (subsection (g)). Certainly, Congress did not intend that the application of these purely federal conditions should vary from state to state according to their separate concepts of branching. And it would be anomalous at the very least to give "branch" in subsection (c) a meaning different from that in the other subsections.

The court of appeals considered that its unnatural reading of the language that Congress used was necessary to avoid "letting the left hand give and the right hand take away" (A. 407), that is, to protect what it regarded as the overriding mandate that there be

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ities amount to operation of a "branch." See *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 19 Utah 2d 18, 425 P. 2d 414. Moreover, apparently satisfied that 12 U.S.C. 36(f) contained a workable definition of a "branch", Congress in 1935 incorporated the same language into the definitional section of the laws pertaining to the Federal Deposit Insurance Corporation. 49 Stat. 684, now 12 U.S.C. 1813(o).

[23] Since replaced by minimum capital requirements.

"competitive equality". As we have shown in the preceding section, there is no such overriding mandate—certainly not a mandate so clear and strong that Congress should be deemed to have intended to deny its words their natural meaning and disrupt the uniform application of other rules of purely federal law to which any such mandate could have no applicability whatever.[24] And Congress' explicit references to state law elsewhere in Section 7 of the McFadden Act make it clear that if Congress had had any such intent it knew well enough how to express it directly.

Even if there were no definitive subsection (f) to be accounted for, the alacrity of the court of appeals in turning to state law for the meaning of "branch" would violate the sound and well settled principle that, in the absence of a clearly manifested congressional intent, words in a federal statute—"[i]ntended to be nation-wide in its application"—are to be given a federal meaning. *New York* v. *Feiring,* 313 U.S. 283, 285; *American Surety Co.* v. *Bethlehem National Bank,* 314 U.S. 314, 316.[25] This rule is especially perti-

[24] Compare *Federal Deposit Insurance Corporation* v. *Tremaine*, 133 F. 2d 827 (C.A. 2), which held that the term "public money" in 12 U.S.C. 90 was to be interpreted as a matter of federal law even though the basic policy behind that statute specifically incorporating state law "was to allow national banks to compete with the state banks on equal terms." 133 F. 2d at 829–830. Accord, *Hood* v. *Hardesty*, 94 F. 2d 26 (C.A. 4). With respect to the competitive equality purpose of 12 U.S.C. 90, see *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 564.

[25] See, also, *United States* v. *Neustadt*, 366 U.S. 696, 705–706; *Jerome* v. *United States*, 318 U.S. 101, 104; *Federal Deposit Insurance Corporation* v. *Tremaine*, 133 F. 2d 827, 828–829 (C.A. 2) (L. Hand, J.); *Hood* v. *Hardesty*, 94 F. 2d 26, 28–29 (C.A. 4).

nent to national banks, which "are brought into existence under federal legislation, [and] are instrumentalities of the Federal Government." *First National Bank in St. Louis* v. *Missouri, supra,* 263 U.S. at 656. In *New York* v. *Feiring, supra,* the mere use in a federal statute of the word "taxes" without any further specification was sufficient for this Court to hold that "taxes" should be defined as a matter of federal and not state law. *A fortiori* this should be true where Congress has gone so far as to establish specific standards for what the term "branch" "shall be held to include."

2. Both the context in which the McFadden Act was enacted and the legislative history of its consideration by Congress make it clear that it was the intent of the Act to deal uniformly with the subject of national bank branching, defining in itself the activities to which its substantive provisions—including the selective incorporation of state law—would apply.

As we have seen, Congress was prompted to act in order to dispel confusion engendered by somewhat dissonant opinions rendered by this Court and two Attorneys General on the extent of the authority of national banks to render banking services, such as receiving deposits and paying checks, at offices other than their main banking houses. The bill before Congress was, of course, regarded as a "branching" bill (see pp. 17–21, *supra*) and the term had come to have a reasonably well established content. Thus, in the 1911 opinion of the Attorney General which this Court had endorsed in the *Missouri* decision only months before

the McFadden bill was introduced, Attorney General Wickersham had distinguished lawful off-premises activities from unauthorized "branch banks." He explained (29 Ops. Att'y Gen. 81, 88):

> a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.[36]

The discussion of the bill focussed primarily upon "branches" in the archetypical sense—that is, offices where general banking business is carried on. But it is instructive to examine the colloquys that took place with respect to the only other type of off-premises service considered—the so-called "teller's windows" sanctioned by the Attorney General in 1923 for such limited functions as receiving deposits and paying checks.[37] Representative Celler objected to these offices, commenting (67 Cong. Rec. 2860 (1926)):

> Absolutely in effect they are branches where they receive deposits, pay out deposits and lend money, and do an actual banking business. * * *

One of the sponsors, Representative Stevenson, promptly assured him, without referring to any state conceptions, that (*ibid.*):

> Under this bill any place is a branch bank where checks are received, deposits are received

[36] See also 10 St. Louis U.L.J. 581, 585 (1966).

[37] See Annual Report of the Secretary of the Treasury for 1923, pp. 875–877.

> or money loaned. * * * We make that a branch, and therefore under the control of the law. * * *

Earlier Representative Stevenson had explained that the definition of "branch" in what is now Section 36(f) would operate *directly* to require the U.S. Comptroller to treat any offices performing the functions listed as "branches". 66 Cong. Rec. 1628 (1925). And it was made clear that the Act would provide the Comptroller with "direct warrant of law"[28] for authorizing offices for the general banking business as well as

> so-called additional offices or tellers' windows * * * provided their establishment conforms to the requirements for the establishment of new branches by national banks as set forth in section 7(c) * * *.[29]

Such a purpose was utterly inconsistent with the existence of any notion that the definition of "branch," and thus the applicability of Section 7(c), should vary from state to state.

The legislative history contains further direct indications that Congress regarded the McFadden bill as carrying with it an independent, controlling federal definition of "branch". The initial House report on the bill, H. Rep. No. 583, 68th Cong., 1st Sess. (1924), explained (at p. 3) that in what became subsection (f):

> *the term 'branch' or 'branches' is defined* so as to include any form of office established outside of the bank for the purpose of receiving

[28] 67 Cong. Rec. 3230 (1926) (Cong. Celler).

[29] 68 Cong. Rec. 5816 (1927) (Cong. McFadden).

> deposits, cashing checks, or making loans. [Emphasis added.]

Similarly, after noting at the time of enactment that his bill "establishes a national branch banking policy", Representative McFadden explained (68 Cong. Rec. 5816 (1927)) that subsection (f):

> *defines the term "branch".* Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting business carried on at the main office, is a branch * * *. [Emphasis added.]

3. True to this history, federal courts and executive officers had generally, until the decision of the court below, interpreted the McFadden Act as pronouncing its own independent definition of the term "branch" without requiring either recourse to or reliance on state law for expanding the scope of activities intended to be covered. Thus, barely three years after the passage of the Act, the Attorney General explained (36 Ops. Att'y Gen. 344, 350 (1930)) that Section 7(f) of the Act, now 12 U.S.C. 36(f),

> defines the term "branch".
> Under that definition any place of business maintained by a national banking association where deposits are received, or checks paid, or money lent, other than the main office of the bank, must be considered a branch thereof.

In turning to state law to determine what constitutes a "branch", the court of appeals expressly refused to follow the approach taken by other courts of appeals (A. 399). See *Camden Trust Co.* v. *Gidney,* 301 F. 2d 521 (C.A.D.C.), certiorari denied, 369 U.S.

886; *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 323 F. 2d 290 (C.A.D.C.), reversed on other grounds, 379 U.S. 411. See, also, *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937, 942–943 (C.A. 9); *Lincoln Bank & Trust Co.* v. *Exchange National Bank & Trust Co.*, 383 F. 2d 694, 697 n.3, 699–700 (C.A. 10); *Jackson* v. *First National Bank of Valdosta*, 246 F. Supp. 134, 138 (M.D. Ga.). In those cases the issue was whether certain activities by national banks or their directors constituted the establishment of "branches" for purposes of 12 U.S.C. 36, and the courts resolved these questions as a matter of federal law without reference to state law concepts of branching.

In *Camden Trust*, the District of Columbia Circuit expressly held that there was no branching even though the dissenting judge pointed out that state law was to the contrary; according to the majority, "[b]eyond peradventure, Congress * * * defined the term 'branch' ". 301 F. 2d at 524. The court thus concluded that, since the new operation was not a "branch" under federal law—however it might be viewed by the state—the limitation in Section 36(c) "has no applicability * * *." 301 F. 2d at 525.[30]

[30] See, also, 10 St. Louis U.L.J. 581, 582 (1966):

> The federal statute defines the term *branch*, and it is this definition which the national banks must follow. Therefore, the specific inclusion of drive-in facilities by the state's definition of branch is irrelevant.

Accord, Comment, *Federalism in Interpretation of Branch Bank-*

C. IF THE STATES AND THEIR BANKING AUTHORITIES WERE EMPOWERED TO INCREASE THE SCOPE OF THEIR AUTHORITY OVER NATIONAL BANKS BY DEFINING "BRANCHING", THE EXISTENCE OF A NATIONALLY ADMINISTERED, COMPETITIVE BANKING SYSTEM WOULD BE SERIOUSLY JEOPARDIZED

The rationale constructed by the court of appeals would have drastic consequences beyond the immediate situation that was before it. Although the national bank legislation has entrusted to the Comptroller of the Currency the primary responsibility for regulating the national banking system, the power of definition that the decision below would give to the states would effect a truly revolutionary shift in regulatory control over an important part of the activities of national banks.

Even prior to the passage of the McFadden Act national banks performed a variety of off-premises activities—including operation of armored car messenger services, the very activity involved here—often with the express approval of this Court. See pp. 16–17, *supra*. Today, imaginative and vigorous national banks

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ing Legislation, 32 U. Chi. L. Rev. 148, 159–166 (1964). Cf. *Nuesse* v. *Camp*, 385 F. 2d 694, 701, 705 (C.A.D.C.); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842, 846 (D.S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970. Compare Handler, *Jurisdictional Abstention in Federal-State Branch Bank Conflicts*, 19 Rutgers L. Rev. 445, 446 (1965):

> It is evident that in actions attacking the legality of a branch established by a national bank the basic question is one of federal law under the National Bank Act, notwithstanding the federal incorporation of underlying state law.

render—with the approval of the federal authorities—many off-premises services and conduct a number of activities not entirely confined to their banking houses, including new-business solicitation, loan closings, sale of money orders and travellers checks, banking by mail, credit card services, various correspondent services, and data processing. Some banks maintain their trust departments in buildings separate from the main bank.[31]

Could Congress, without any discussion and without any express provision in Section 36 or elsewhere, have intended that the lawfulness of such activities should turn on variable and often elusive state conceptions of what constitutes a branch? Surely not. Yet, this is exactly what the court of appeals' decision would entail. Under the court's decision a state would be able to define any off-premises activity as "branching", and thus bring it within the sphere of state law incorporated into 12 U.S.C. 36(c). By so doing, a state could confine the service activities of national banks to the banks' four walls if the state so chooses. This remarkable result would entrust to the states not only the power explicitly granted them in 12 U.S.C. 36(c) to

[31] The restrictions on the activities in which national banks may engage are, of course, not found solely in the limitations on establishing "branches." See, generally, Beatty, *What Are the Legal Limits to the Expansion of National Bank Services?* 86 Banking L.J. 3 (1969).

In part two of this brief we discuss our reasons for believing that the district court properly ruled that the services performed in this case do not amount to branching and are otherwise lawful under the National Bank Act.

determine the lawfulness of "branching" by national banks, but also the power to determine the scope of their own exercise of that control.

Such far-reaching state power—and indeed the power that would be exerted by the Florida Commissioner in the situation involved in this case—would be inconsistent with the fundamental autonomy of the national banking system. Congress has taken pains to shield that system from "the hazard of unfriendly legislation by the States", *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 413. Moreover,

> [n]ational banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit. * * * [*Van Reed* v. *People's National Bank,* 198 U.S. 554, 557.]

Thus, no provision of state law may be applied to national banks if it would "interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." *First National Bank in St. Louis* v. *Missouri, supra,* 263 U.S. at 656.[32] It is unnecesary in this case to probe the precise

[32] Accord, *Lewis* v. *Fidelity & Deposit Co. of Maryland,* 292 U.S. 559, 566; *Franklin National Bank of Franklin Square* v. *New York, supra,* 347 U.S. at 378; *Mercantile National Bank of Dallas* v. *Langdeau,* 371 U.S. 555, 558–559.

extent to which this immunity from state control is constitutionally compelled, in the absence of statutes; here there is ample basis for concluding that, in defining "branch" in subsection (f), Congress has established the "paramount" standard for determining what is a "branch". Compare *M'Culloch* v. *Maryland,* 4 Wheat. 316, with *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.[33]

The decision below would subject national banks to unfriendly state legislation that would interfere seriously with the purposes of their creation and their efficiency as federal agencies. Far from finding any statutory authorization for such interference, the court below would sanction it in the teeth of statutory language that can only be read as preserving federal authority.

2. The court of appeals did not restrict its reliance on state law definitions to the express provisions of state *statute* law.[34] Instead, the court accepted, at least

[33] See *South Dakota* v. *National Bank of South Dakota,* 219 F. Supp. 842, 846 (D. S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970.

[34] Florida Statute 659.06 is set forth at pp. 53–54, *infra.* It will be seen that the statute on its face is ambiguous as to whether or not Florida law would consider the present activities of First National as "branching." Subsection (1)(a) limits banks to "one place of doing business." The term "place of doing business" is obviously subject to a variety of interpretations. There is a similarly critical ambiguity built into subsection (2), prohibiting the operation of "any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto." For subsection (2) appears to define a "drive-in or walk-up facility" as a facility which provides "one or more tellers

conditionally, the interpretation accorded Florida law by the Florida Commissioner in writing to the First National Bank to object to its proposed services. This holding conflicts with the well reasoned opinion in *South Dakota* v. *National Bank of South Dakota,* 219 F. Supp. 842, 848–850 (D. S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970, and with the approach taken in *Howell* v. *Citizens First National Bank of Ridgewood,* 385 F. 2d 528 (C.A. 3), and *Union Savings Bank of Patchogue* v. *Saxon,* 335 F. 2d 718, 723 (C.A.D.C).[35] This deference is especially incongruous when contrasted with the minimal weight to be accorded lower state courts in determining state law in other contexts. See, *e.g., Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U.S. 456, 465; *King* v. *Order of United Commercial Travelers of America,* 333 U.S. 153, 160–162; *Roginsky* v. *Richardson-Merrell, Inc.,* 378 F. 2d 832, 851 (C.A. 2).

The court of appeals candidly acknowledged that "national banks may well fear the authority of state comptrollers to make extreme use of this * * * de-

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to serve patrons in vehicles and on foot." In the context of the present case, the question which would be open to dispute is whether First National's activities involve the use of "tellers" within the meaning of the Florida statute. This question is currently being litigated in the Florida courts. See p. 8, *supra.*

[35] Although those cases interpret 12 U.S.C. 36(c) and not 12 U.S.C. 36(f), it should be noted that the insistence in 12 U.S.C. 36(c) on state *statute* law would be put at naught if state administrative interpretations could be applied in interpreting 12 U.S.C. 36(f). For state administrative interpretations of whether or not an activity constitutes a "branch" could be used to circumvent the requirement of 12 U.S.C. 36 that only express state statute law be considered in determining the state law as to whether a "branch" is permitted.

fining process" (A. 407).[36] This warning is more than merely idle speculation. In many states (not including Florida) the state banking departments, either by law or custom, are controlled by persons from or associated with state banks.[37] In most states there is no state statute or case law on what constitutes a "branch", and thus "the most authoritative interpretation of what constitutes a branch under state law would be the current attitude of the state banking commissioners." Comment, *supra,* 32 U. Chi. L. Rev. 148, 161 (1964). And in this connection, we note that the court of appeals suggested that the Florida statute here might be construed to prohibit a bank from conducting *any* activities away from its main office whenever the function performed meets the test of "doing business" for purposes of service of process on foreign corporations (A. 408–409), citing *Phillips* v. *Hooper Chemical Corp.,* 375 F. 2d 189 (C.A. 5) (which recognizes the "minimum contacts" test under Florida law). In view of the vagueness of the "doing

[36] While the court below also suggested it was deferring to state law only in "penumbral" areas (A. 406), the only possible line to demarcate the edge of the "penumbra" is between on-premises and off-premises banking activity. Any off-premises banking activity would appear to be within the penumbra and thus vulnerable to the states' making "extreme use of this * * * defining process."

[37] The United States Comptroller advises us that in 14 states the state banking commissioners are former state bankers, while in only four states are the commissioners former national bankers. Perhaps more significantly, of the 30 states having state banking boards, in at least 21 of those states either by law or custom a majority of the members of the boards are composed of state bankers. In eight states, this majority is required by law.

business'' test and the wide variety of activity that it may be held to cover, it is apparent that this reading of the Florida statute would give the state banking commissioner sweeping authority over the activities of national banks.[38]

3. Another congressionally unintended consequence of the view taken by the court below would be the in-

[38] To illustrate the actual sweep of this ruling, we call the Court's attention to several recent decisions by state banking authorities holding various off-premises activities illegal "branches": in Texas, vending machines for acceptance of deposits, with the company owning the machines acting as agent for the depositor, were nevertheless held to be branches (*American Banker*, September 3, 1968, p. 4); respondent Commissioner of Banking of the State of Florida on October 2, 1968, sent a letter to all state and national banks in Florida declaring "loan production offices" violative of Fla. Stat. 659.06 (1)(a); the Wisconsin Attorney General on October 18, 1968, advised the State Commissioner of Banking that "teller machines" are illegal branches; on October 30, 1968, the Oklahoma Attorney General rendered the same advice to the Bank Commissioner of that state; on the basis of opinions from the Attorney General of Illinois, the Commissioner of Banks and Trust Companies on November 26, 1968, wrote to all banks doing business in that state that deposit machines and loan production offices are prohibited branches; banks in North Carolina were notified by the Commissioner of Banks on January 3, 1969, that relaying of a loan application constitutes illegal branching; on March 31, 1969, the Kentucky Attorney General advised the state's Commissioner of Banking and Securities that a bank's ownership of an off-premises deposit machine would be illegal branching.

And in ruling recently that certain loan-production activities of a national bank would violate Georgia anti-branching laws, the state Commissioner explained: "As you probably know, the Fifth Circuit Court of Appeals has ruled that the National Bank Act requires that national banks conform to state banking authorities' definitions of branch banking." *American Banker*, January 3, 1969, pp. 1, 13.

ability of the United States Comptroller to give authoritative advice as to whether an existing or proposed off-premises activity is a "branch". Section 36 specifies only "the approval of the Comptroller of the Currency" as a prerequisite to establishment of a national bank branch. And it has long been recognized that

> A provision in a State statute requiring consent of the State bank supervisor to State bank branches is not applicable to National banks. The applicability of such a provision would, in effect, give a State Supervisor a veto power over branches of National banks.[39]

Yet, as an unavoidable result of the decision below, the exclusively federal administrative system would be complicated by the practical necessity that national banks obtain rulings from state banking authorities in order to be sure that such an activity would be legal.[40] Indeed, the U.S. Comptroller would be unable to determine whether or not an activity is one for which his approval is required under the statute until he knew whether the state authorities considered it a

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[39] Bell, *National Bank Branches—The Authority to Approve and to Challenge*, 82 Banking L.J. 1, 5 (1965). See *e.g.*, *South Dakota* v. *National Bank of South Dakota*, *supra*; *Attorney General ex rel. State Banking Commissioner* v. *Michigan National Bank*, 298 Mich. 417, 437, 299 N.W. 129, 136.

[40] While 12 U.S.C. 36(c) incorporates state law, it refers to express state law and state statute law, thus obviating any practical necessity for a ruling by the state banking authorities. See *Howell* v. *Citizens First National Bank of Ridgewood*, *supra*; *Union Savings Bank of Patchogue* v. *Saxon*, *supra*; *South Dakota* v. *National Bank of South Dakota*, *supra*.

"branch." The effect would be unacceptable disruption in the administration of the federal banking laws.[41]

These novel and disruptive results, however, are not compelled by the terms of 12 U.S.C. 36. Surely, Congress, in enacting a statute on "branching", had no notion that it was ceding to the states and their banking authorities *carte blanche* authority to regulate all off-premises activities of national banks. Indeed, if we understand respondents' position correctly, even they agree that the court below went too far in holding state law as "controlling" the scope of "branch", for they have agreed that "[s]tate law prohibiting an off-premises banking activity as branching applies to national banks *only if* the activity in question first meets the test of branchness set forth in section 36(f)" (Respondents' Brief in Opposition to Petition of the Comptroller for a Writ of Certiorari, No. 932, O.T., 1968, p. 6). In short, the court of appeals committed reversible error in refusing to determine whether First National's activities constituted establishment of a "branch" for purposes of Section 36(c) as a matter of independent federal law controlled by the standards of Section 36(f).

[41] The decision below may also significantly alter the administration of the federal banking laws with respect to *state* banks. The provisions of 12 U.S.C. 321 pertaining to the conditions on which state member banks of the Federal Reserve System may establish "branches" are keyed to the conditions imposed on national banks under 12 U.S.C. 36. Likewise, since 12 U.S.C. 1813(o) defines "branch" in terms virtually identical with 12 U.S.C. 36, control by the Federal Deposit Insurance Corporation through 12 U.S.C. 1828(d) over branching by state nonmember insured banks would undoubtedly be affected by the court of appeals' decision.

II. THE DISTRICT COURT PROPERLY FOUND THE SERVICES RENDERED IN THIS CASE WITHIN THE NATIONAL BANK'S LAWFUL AUTHORITY

If the Court agrees that the court of appeals erred in failing to apply federal law as the exclusive test of branching, the remaining question is whether First National's armored car service and off-premises receptacle constitute "branches" within the meaning of Section 36. This second question is treated fully in the brief for the petitioner national bank, and we shall discuss it only briefly here.

After careful examination of extensive depositions, describing the operation of First National's armored car messenger service and secured receptacle, and consideration of the contractual relationships established in the use of these services, the district court concluded that the activities were neither "branches" within the meaning of 12 U.S.C. 36 nor otherwise in violation of the National Bank Act. These rulings were sound, and the judgment premised on them should be reinstated.

First National instituted its services on the basis of rulings from the Office of the Comptroller of the Currency (pp. 3–4, *supra*).[42] In interpreting the statutory definition in 12 U.S.C. 36(f) to conclude that these services do not amount to establishment of a "branch", the Comptroller was acting within his lawful province as the official charged with the responsibility for interpreting and applying this section of the National Bank Act. Under settled principles, his

[42] The Federal Reserve Board has made a similar ruling for the banks it regulates. See 12 C.F.R. 208.110.

construction of the statute is entitled to controlling weight unless manifestly or demonstrably unreasonable.[43] The interpretive rulings covering this case are quite consonant with the statute and thus were properly accepted by the district court.

As First National argues more fully in its brief, the operation of its armored car and off-premises receptacle in compliance with the rulings of the U.S. Comptroller does not constitute receiving deposits, paying checks, or lending money—the exclusive tests of branching as prescribed in 12 U.S.C. 36(f). For example, under general principles of law, deposits are not "received" by their placement in the secured receptacle or their pick-up by the messenger, because a bank deposit cannot arise without some unequivocal act whereby both parties express their consent to the creation of the status or debtor and creditor. *E.g., Bernstein* v. *Northwestern National Bank,* 157 Pa. Super. 73, 41 A. 2d 440. See also *Kolt* v. *Cleveland Trust Co.,* 156 Ohio St. 26, 99 N.E. 2d 902; *In re*

[43] See *Securities and Exchange Commission* v. *New England Electric System,* 384 U.S. 176, 185; *Udall* v. *Tallman,* 380 U.S. 1, 16–18; *Board of Governors* v. *Agnew,* 329 U.S. 441, 446–447; *Billings* v. *Truesdell,* 321 U.S. 542, 552–553. Cf. *Community National Bank of Pontiac* v. *Saxon,* 310 F. 2d 224 (C.A. 6); *American Bank & Trust Co.* v. *Saxon,* 373 F. 2d 283 (C.A. 6); *First Hardin National Bank* v. *Fort Knox National Bank,* 361 F. 2d 276 (C.A. 6), certiorari denied, 385 U.S. 959; *Webster Groves Trust Co.* v. *Saxon,* 370 F. 2d 381 (C.A. 8).

Deference to the *federal* administrative interpretation, with its ability to take account of contemporary industry notions of "branch banking", sufficiently accords the "flexibility" which the court below recognized was necessary in order to avoid "devitaliz[ing] section 36(f) with eternally static concepts" (A. 407).

Farmers State Bank of Amherst, 67 S.D. 51, 58–59, 289 N.W. 75, 78–79. But an *agency* agreement between the bank and the customer, such as is required by the Comptroller's rulings and was found by the district court to have been implemented in this case, obviates any expression of such consent. Compare *Moses Lake State Bank* v. *Bell,* 128 Wash. 523, 223 Pac. 587.

Similarly, the district court was correct in its conclusion that these services do not transgress the requirement of 12 U.S.C. 81 that a national bank transact its "general business" only at its main banking house or authorized branches. In light of this Court's express recognition in *Merchants' Bank* v. *State Bank,* 10 Wall. 604, 650–651, that national banks may lawfully conduct specific functions off-premises, "it is not difficult to conclude" (A. 372) that the particular ancillary services rendered in this case do not amount to the "general banking business."

Thus, since the activities sponsored by the First National Bank in Plant City did not violate federal law and were not within the class of activities Congress intended to subordinate to state restrictions, the bank was entitled to the relief it obtained in the district court.

CONCLUSION

The judgment of the court of appeals should therefore be reversed and the cause remanded with directions to affirm the judgment of the district court.

Respectfully submitted.

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MAY 1969.

APPENDIX

I

12 U.S.C. 36 provides as follows:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b)(1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as as branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph

if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county

in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in

the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601–604 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

II

The original text of Section 7 of the McFadden Act of 1927 (44 Stat. 1228–1229), from which 12 U.S.C. 36 is derived, was as follows:

Section 7. That section 5155 of the Revised Statutes of the United States be amended to read as follows:

"SEC. 5155. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

"(a) A national banking association may retain and operate such branch or branches as it may have in lawful operation at the date of the approval of this Act, and any national banking association which has continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act may continue to maintain and operate such branch.

"(b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.

"(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association in situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.

"(d) No branch shall be established after the date of the approval of this Act within the limits of any city, town, or village of which the population by the last decennial census was less than twenty-five thousand. No more than one such branch may be thus established where the population, so determined, of such municipal unit does not exceed fifty thousand; and not more than two such branches where the population does not exceed one hundred thousand. In any such municipal unit where the population exceeds one hundred thousand the determination of the number of branches shall be within the discretion of the Comptroller of the Currency.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

"(g) This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

"(h) The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

III

Section 659.06 of the Florida Statutes provides:

(1)(a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

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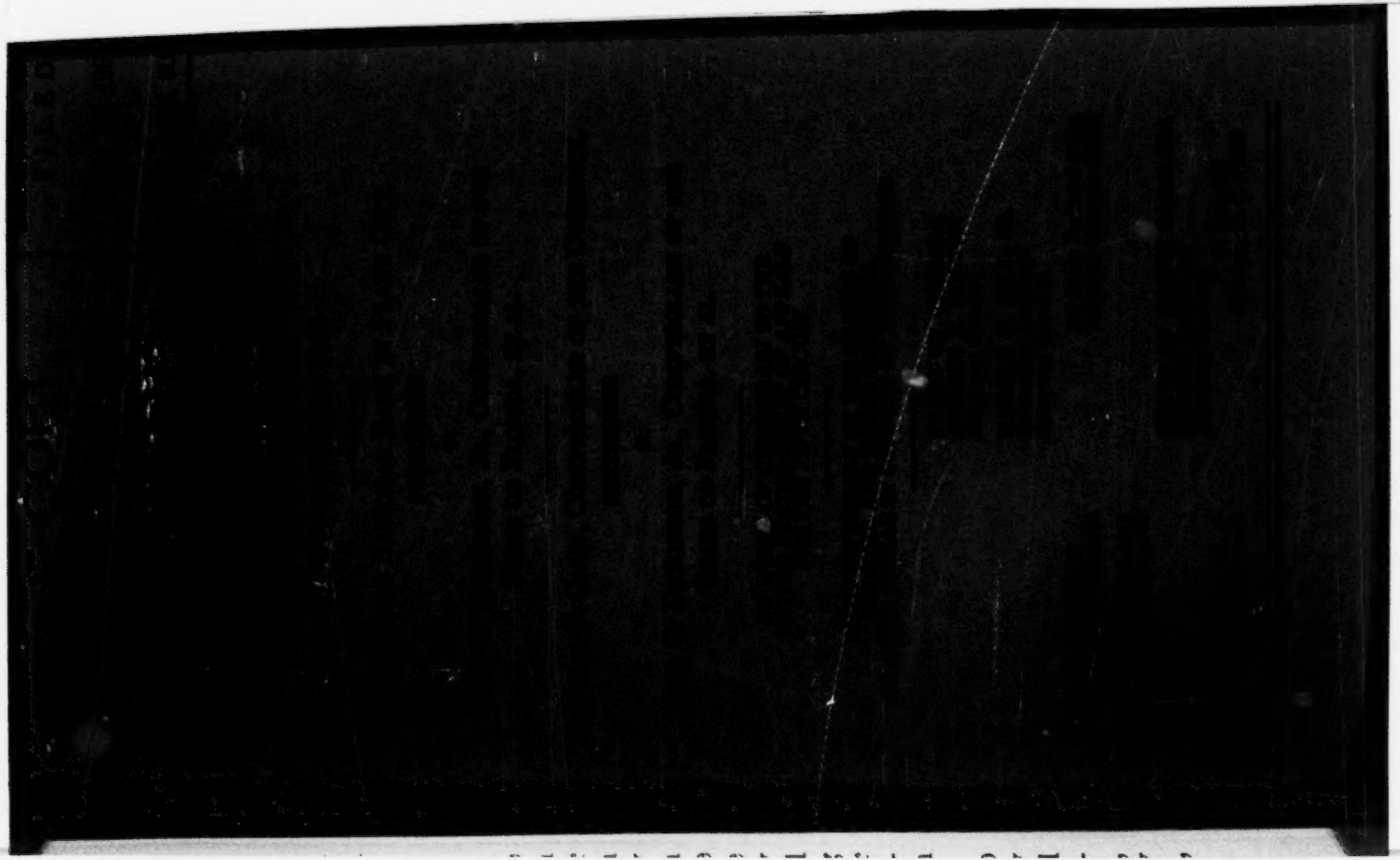

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In The Supreme Court of the United States

OCTOBER TERM, 1968

THE FIRST NATIONAL BANK IN PLANT CITY,
PETITIONER
v.
FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
PETITIONER
v.
FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA. ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE STATES OF GEORGIA AND NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is filed by the States of Georgia and North Carolina pursuant to permission granted by Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED, STATUTES INVOLVED, STATEMENT OF THE CASE

We adopt the sections in Respondents' brief which set out the question presented, statutes involved and statement of the case.

INTEREST OF AMICI CURIAE

Both States have several interests in the case. First, each State has laws which restrict, to some degree, branch banking in the State.

Secondly, each State presently has the problem of a national bank operating a mobile banking service in its jurisdiction in violation of the State branching laws. The same bank is operating in both States and the issue is presently on appeal to the 5th Circuit, having been decided favorably to the States by the District Court.

Finally, both States hope to allay any intimation that Georgia or North Carolina has any wish to curtail the legal activities of *any* bank, national or state. We emphasize to the Court that our only desire is to administer the law in the same spirit and with the same intent as the Congress and our State legislatures have enacted it.

ARGUMENT

REGARDLESS OF WHICH DEFINITION OF "BRANCH BANKING" THE COURT APPLIES IN THIS CASE, THE ACTIVITIES OF A TYPICAL MOBILE BANKING SERVICE CONSTITUTE BRANCH BANKING.

We have little doubt that the able counsel on both sides of this issue will adequately present to the Court the questions of law. We appear in this case to set forth the facts of an actual operation of a mobile banking service so that the Court may better understand the context of the problem.

It is most important to remember that the following operation is conducted over an area covering 10 counties and 2 states. We do not hazard a guess at the lengths to

which this operation could extend. The facts are taken from the findings of fact set out by the District Court in *Jackson v. First National Bank of Cornelia*, 292 F. Supp. 156 (N.D. Ga. 1968).

Relying on paragraph 7490 of the Comptroller's Manual, the bank purchased three armored trucks. Each has a driver's compartment and rear compartment. Two of the trucks have a large plate glass window in the side of the rear compartment together with a pass-through drawer to the outside of the vehicle. Each truck is equipped with a two-way radio, periodically used to dispatch orders pursuant to customers' telephone requests received at the bank after the truck has already left the banking house and for emergency purposes. The employee operating each truck is armed with a pistol.

The messenger service is operated daily, six times a week. The armored truck is owned by the bank and is operated by employees of the bank. The bank also purchased the insurance coverage for the operation. Customers are not charged for the service. The bank's armored trucks call on 235 customers at least once a week, 220 customers four times a week and approximately 50 customers six times a week.

The following transactions are conducted by the bank's mobile service:

(a) *The Transmittal of Funds to the Bank:*

The armored truck banking service is provided to call at a customer's place of business to pick up cash and checks for the purpose of transporting them to the bank's banking house, where they are deposited to the customer's account. The customers who use the service have

accounts with the bank. Prior to using the service, they signed a "Messenger Service Agency Contract" which provided that the bank's messenger transports the monies and checks to the banking house as the agent of the customer. When a customer send funds to the bank, he accompanies them with a transmittal slip on which he itemizes them. The transmittal slip contains a "Contract" which provides that the bank "messenger" is acting as the agent of the customer, and that the currency, coins and checks transmitted by messenger to the bank's premises will not be deemed to be a deposit until delivered by the messenger into the hands of a teller on the bank's premises. Both the transmittal slip and the messenger service agency contract provide that the bank is maintaining hazard insurance for the protection of the customer.

(b) *The Making of Change:*

Each armored truck carries between $2,000 and $3,000 in small bills and coins belonging to the bank. A customer using the service may, when the armored truck calls, have large bills changed into smaller bills or coins. Such a transaction does not involve checks, but is the exchange of cash for cash.

(c) *The Transmittal of Funds from the Bank:*

The service is also used to transport cash to those customers who have signed the "Messenger Service Agency Contract." The contract provides that in this situation, also, the bank's messenger is acting as the agent of the customer. Sums transported to the customer by this method are withdrawn by an "Authorization of Debit" or a withdrawal slip and the sums are accompanied by

a receipt slip indicating that the customer's account has been charged for the amount of the order. A common use of this service is the delivery of currency and coins to be used as change by businesses.

(d) *The Furnishing of a Teller's Service for Payroll Cashing:*

The bank also uses the armored truck to provide a payroll cashing service to certain of its customers outside the city limits of Cornelia, Georgia. In such instances, funds are delivered by the service to the customer's place of business pursuant to a written order form. For delivery, a teller accompanies the driver of the armored truck. When the funds are delivered, the teller accompanies the messenger into the customer's place of business and, at a counter set by the customer, cashes the payroll checks of the customer's employees, which are drawn not only on defendant bank but on other banks as well.

We believe that a consideration of these facts will readily show that regardless of which definition of "branch banking" the Court applies in this case, there can be little question that the activities of a mobile banking service are the life-blood functions of banking and they would constitute the operation of a branch bank.

CONCLUSION

The judgment of the United States Court of Appeals for the 5th Circuit should be affirmed.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 777 and 932

THE FIRST NATIONAL BANK in PLANT CITY,
Petitioner

vs.

FRED O. DICKINSON, JR., COMPTROLLER of the STATE of FLORIDA, ET AL.

WILLIAM B. CAMP, COMPTROLLER of the CURRENCY,
Petitioner

vs.

FRED O. DICKINSON, JR., COMPTROLLER of the STATE of FLORDIA, ET AL.

BRIEF FOR AMICI CURIAE INDEPENDENT BANKERS ASSOCIATION OF AMERICA, INDEPENDENT BANKERS OF FLORIDA AND WESTERN INDEPENDENT BANKERS

INTEREST OF AMICI CURIAE

Amici are associations of independent, locally owned, national and state banks. The Independent Bankers of Florida is a nonprofit association composed of about 200 independent unit banks in that state. The Independent Bankers Association of America is a nonprofit association composed of over 6400 independent unit banks in 41 states, including

Florida. The Western Independent Bankers is a nonprofit association representing almost 400 banks in 9 western states.

These associations are organized to represent the interests of unit banks, to preserve competition while preventing concentration of control of banking, and to maintain the national policy of competitive equality between national and state banks.

The *Amici* associations are alarmed by the use of the armored car and shopping center receptacle in the instant case. If these off-premise operations by national banks in Florida and elsewhere are permitted to continue and spread, national banks will have gained an advantage contrary to the national policy of competitive equality. In addition, the trend to banking concentration will inevitably increase.

QUESTIONS PRESENTED; STATEMENT; AND STATUTES INVOLVED

The Questions Presented; Statement; and Statutes Involved are as stated by respondents. Two other statutes were raised in the pleadings and argued in the proceedings below. 12 U.S.C. §24 (7) and §81 in their pertinent parts read as follows:

> "Section 24: Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or

duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; * * *"

"Section 81: The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title."

SUMMARY OF ARGUMENT

I.

Since the National Bank Act was originally enacted, Congress has been faced with the problem of resolving conflicts with state bank systems. To solve this problem, Congress has chosen a policy of competitive equality by specifically adopting state standards in certain basic areas. But, if a supervisor of one system attempts to extend the powers of banks in his system by "rulings", the policy of competitive equality is thwarted.

II.

A. The "agency" ~~arguments~~ agreements between the Appellant bank and its customers are merely devices to evade and frustrate the applicable statutes and the Congressional policy of competitive equality. No valid "agency" can be created if it violates law, public policy, or injures third parties (e.g. Florida state banks).

B. The National Bank Act (12 U.S.C. §81) and the Florida Banking Code (*Fla. Stat.* §659.06(1)(a)) each provide that banks shall do business in "one-location" as applied to this case. This Court has recognized in numerous

decisions that state law applies to national banks if it does not conflict with federal law. Control and supervision of bank locations is an important element in maintaining competitive equality. The activities of Appellant bank violate both the federal and state "one location" laws.

C. Florida law (*Fla. Stat.* §659.06(1)(a)) prohibits branching and this law is specifically incorporated into the National Bank Act (12 U.S.C. §36(c)) to prohibit national banks in Florida from branching. Section 36(f) which defines a branch is only a partial definition and incorporates state standards. However, the definition contained in Section 36(f) covers the activities of the Appellant bank without resort to state standards. The Utah Supreme Court has held that certain off-premise activities of a bank are "branches" under a statute almost exactly the same as Section 36(f). The fears of the Comptroller and *Amicus* Georgia bank are without foundation since state bank supervisors will not attempt to hamper national banks. Any such "rulings" would adversely affect state banks as well and would not give state banks competitive advantages over national banks. Since the off-premise activities of Appellant bank are branches, they are prohibited by the provisions of the National Bank Act and the Florida Banking Code.

III.

A. The off premise activities of Appellant bank are not "incidental powers as shall be necessary to carry on the business of banking" under 12 U.S.C. §24(7). The "rulings" of the Comptroller in this case are but one example of his extension of national bank powers to gain competitive advantages for national banks. The Comptroller's record in recent years shows he is not in accord with the Congressional policy of competitive equality.

B. Branching is the fastest means to concentration of control of banking. The effects of such concentration are detrimental to the economy. Congress has shown concern over the effects of concentration by enactment of the Bank Holding Company Act and the Bank Merger Act. Each state should be free to adopt a policy which prevents such concentration and should have protection against a federal administrator intent upon changing its banking structure.

ARGUMENT

Introduction

This case arises as a result of a ruling of the Comptroller of the Currency in which he reversed numerous former rulings of his office dating back over a period of years. The ruling, Par. 7490 of the Comptroller's Manual for National Banks (A.381), purports to allow any national bank to use an armored car messenger service, owned by the bank and operated by bank employes, if these employes are "agents" of the bank's customers. In addition, a letter ruling by the Regional Comptroller (A.21) authorized the use of a deposit receptacle in a shopping center if the messenger taking the deposit from the receptacle to the bank is an "agent" of the bank's customer.

Respondents contend, and the *Amici* associations wholeheartedly agree, that these off-premise activities are clear violations of the federal branching law, 12 U.S.C. §36, the federal and state one-location laws, 12 U.S.C. §81 and Fla. Stat. §659.06, and the federal implied powers law, 12 U.S.C. §24(7).

Basic to an understanding and resolution of the questions presented are the historical background of our dual bank-

ing system, the breakdown of the statutory scheme which sustains it, the reasons for the "rulings" of the Comptroller of the Currency which have caused the mischief, and the implications to banking and the economy if these rulings are sustained.

I.

HISTORICAL BACKGROUND

From the beginning of banking in this country, there has never been any doubt as to the constitutional right of the states to charter banks and branches. On the other hand, in the early history of the federal government, there was doubt as to its constitutional power to charter banks. However, in *M'Culloch v. Maryland,* 17 U.S.(4 Wheat.) 316 (1819), the constitutionality of the charter by Congress of the Second United States Bank was sustained. This decision and others, e.g., *Osborn v. Bank of the United States,* 22 U.S.(9 Wheat.) 738 (1824) provided the basis for the national bank system in 1863.

Once it was established that state governments and the federal government each had the right to charter banks, it was inevitable that conflicts between the two bank systems would arise. Congress from the early days of the national bank system was faced with the problem of resolving these conflicts.

One solution would be for Congress to establish an independent national bank system, without regard to state laws regulating competing state banks. But this would produce one of two consequences. Either state legislatures would be forced to follow the federal statutes and regulations, or state banks would convert to federal charters in order to become competitive. In the end, this process would create a monolithic banking system throughout the country.

In its wisdom Congress has rejected such a proposal. For example, in the bill which later became the Banking Act of 1933, a proposal was made that national banks be permitted to branch statewide without regard to state law.[1] Before adoption of the bill, however, it was amended to provide that national banks could establish branches only as authorized to state banks by state law.[2]

The solution which Congress adopted and has consistently followed is the use of state law as the standard to provide for competitive equality between the two systems. Various sections of the National Bank Act specifically adopt state standards in several basic areas.[3]

There are other reasons, beyond resolving conflicts, for the policy of competitive equality. It recognizes the disparity in the economies of the various states, and the impracticality of a monolithic banking structure, e.g., what is best for an industrial state may be the worst for an agricultural state. The policy acknowledges that each state is best able to decide for itself what kind of banking structure is best suited to its economy. Banks in each system may voluntarily convert to the other system, and this option is intended to enhance fairness of regulation in both systems. Thus, within each state, national and state banks compete under the same basic laws.

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[1]S. Rep. No. 584, 72d Cong., 1st Sess. (1932); 75 Cong. Rec. 8350 (1932).

[2]76 Cong. Rec. 2205-2208 (1932). A thorough review of the legislative history of branch banking is contained in First National Bank v. Walker Bank and Trust Company, 385 U.S. 252 (1966).

[3]As to the measure of allowable capitalization of new national banks, 31 Stat. 48 (1900), 12 U.S.C. §51 (1935); as to interest rates on loans, 48 Stat. 191 (1932), 12 U.S.C. §85 (1935); as to securing public money deposits, 31 Stat. 1448 (1901), 12 U.S.C. §90 (1950); as to trust powers, 76 Stat. 668 (1962), 12 U.S.C. §92a(a) (1962; as to conversion of a national bank to a state bank, 64 Stat. 456 (1950), 12 U.S.C. 214c (1954); as to interest on demand deposits, 48 Stat. 181 (1933), 12 U.S.C. §371a (1935); as to interest on savings deposits, 12 U.S.C. §371 (1933), and as to taxation of national banks, 13 Stat. 111 (1864), 12 U.S.C. §548 (1926). *See* Franklin Nat'l Bank of Franklin Square v. People of State of New York, 374 U.S. 37 (1954).

Neither has advantages over the other *if these laws are properly interpreted and administered.*

In the instant case, the federal Comptroller has improperly interpreted federal law in order to extend to national banks a privilege not available to state banks under state law, thus giving national banks a competitive advantage. This case presents but one in a growing list of court tests of other "rulings" of the federal Comptroller which have disrupted the national policy of competitive equality, as we will develop later in this brief.

First, however, we will demonstrate that the federal Comptroller's "rulings" pertaining to the instant case (App. 21, 381) are attempted circumventions of law that cannot stand up under scrutiny despite the elaborate legal fictions designed to justify them.

II.

THE OFF-PREMISE ACTIVITIES OF APPELLANT BANK VIOLATE FEDERAL AND STATE LAWS

A. The "Agency" Agreements Do Not Create a Valid Agency.

The position of the Appellants, relying upon the federal Comptroller's "rulings", is based upon the validity of the "agency" agreements to the effect that the armored car messenger and the shopping center receptacle are agencies of the customers and not of the Appellant bank.[4] On analysis, both the armored car and receptacle are instrumentalities of the

[4]A review of the district court decision shows it rests on the validity of the "agency" agreements. Judge Carswell stated, "To argue that deposits are received or checks paid away from the banking premises is to ignore the plain effect of the deposit and agency contracts entered into by the bank and its customers". (A. 371).

bank and are merely extensions of its main office operations to other locations.

Under the facts in this case, the bank's presence in its operations is in the person of its employe, the messenger. His activities away from the bank's premises are the bank's activities.

In contrast, independent armored car services, like "Brinks", have been commonplace in banking throughout the country for many years. The difference is that Brinks armored car service is an independent agency, operating as a licensed common carrier under contracts with bank customers who pay for the service rendered for them. Such a messenger is the true agent of the customer, not of the bank. In this case there is no independent or third-party agent, merely a bank-customer relationship.

Courts regularly frown on forms or devices created and used for the purpose of evading, circumventing or frustrating statutory restrictions or prohibitions. While the settings vary, the principle is the same. As one court stated, "Realities, in short, and not mere forms must be considered by the courts. . . ."[5]

It is true that a bank and its customer may contract as to their deposit relationship and respective rights. However, there are important exceptions to this general rule to the effect that such a contract may not violate law, public policy or injure third-parties (in this case, Florida state banks).[6] The "night depository" cases cited by Appellant bank are not applicable since they involve on-premise, not off-premise, activ-

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[5]Francis O. Day Co. v. Shapiro, 267 F.2d 669, 673, (D.C. Cir. 1959). *See also* Whitney Nat'l Bank v. Bank of New Orleans and Trust Co., 323 F.2d 290 (D.C. Cir. 1963), *rev'd on procedural grounds*, 379 U.S. 411 (1965).

[6]9 C.J.S. *Banks and Banking* §267 (1938); 10 Am. Jur. 2d *Banks* §338 (1963).

ities and involve no restrictive statutes, as in the instant case.

B. The Off-Premise Activities of Appellant Bank Are Prohibited by the "One-Location" Sections of the National Bank Act and the Florida Banking Code.

Federal law permits national banks to operate at only one location unless the state laws where they operate permit them to have more than one location. In Florida, state banks are prohibited from having any branches and are expressly restricted to one location. Thus, national banks operating in Florida may not engage in banking operations away from the bank.

It is noteworthy that the federal and state law concerning location of a bank are almost identical in this case.

The federal "one-location" law, 12 U.S.C. §81, states in its pertinent part:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the * * * branches, if any, established * * * in accordance with * * * section 36 of this title.

The Florida law, *Fla. Stat.* §659.06(1) (a), states in its pertinent part:

> Any bank * * * shall have only one place of doing business * * * and the business of the bank * * * shall be transacted at its banking house * * * and not elsewhere.

Since the Florida statute prohibits any branching, the Appellant bank is limited by Section 81 to operating its banking business at its bank location and nowhere else.

The Florida statute, not being in conflict with the federal statute, also acts to bar the plaintiff bank from conducting its business at more than one place.

This Court in *First National Bank v. Missouri,* 263 U.S. 640, 656 (1923) stated:

> National banks are brought into existence under federal legislation, are instrumentalities of the Federal Government and are necessarily subject to the paramount authority of the United States. Nevertheless national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.

In *Lewis v. Fidelity & Deposit Co.,* 292 U.S. 559, 566 (1934), this Court stated:

> But a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law.

In *Franklin National Bank of Franklin Square v. People of State of New York,* 347 U.S. 373, 378, n. 7 (1954), this Court stated:

> Even in the absence of such express language, national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law.

We place particular stress upon control of bank and branch locations because the dual banking system would not work without such control. This is particularly true in Florida which has a "one-location" law.

Once the charter is granted, a national bank must conduct its business only at the place specified in its certificate.[7] It may change its place of doing business to another place only upon strict compliance with the transfer statute. 12 U.S.C. §30.

Likewise, Florida statutes underscore the importance of location. An application for a state bank charter must show "where the proposed bank * * * is to be located". *Fla. Stat.* §659.02(1) (d). The state comptroller is required to investigate whether there is need for a bank at the proposed location. *Fla. Stat.* §659.03 (1)(b). The state bank may operate at "only one place". *Fla. Stat.* §659.061(1)(a). The state bank may "change the location of its banking house" only "with written approval". *Ibid.*

Although some off-premise agency activities of a national bank may be legally permissible for administrative purposes, this is not such a case. When such activities interfere with the basic principle of competitive equality, and injuriously affect third-parties, namely, state banks in Florida, a bank cannot take shelter under the "administrative agency" umbrella to shield itself from the "one-location" laws. The off-premise activities of the Appellant bank violate both federal and state one-location laws. This violation alone could decide the instant case without resorting to branching laws or the definition of a branch.

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[7]Rep. McFadden, author of the amendment to Section 81 in 1927 explained the purpose of the amended section: "Section 8 amends section 5190 of the Revised Statutes so as to permit the general business of national banking associations to be carried on *at the home office and in the branch or branches which the bank may legally establish or maintain* in accordance with the provisions of section 5155 of the Revised Statutes as amended by this act. This section simply legalizes the business of banking that may be carried on in the branch or branches of national banks lawfully established." (Emphasis added.) 68 Cong. Rec. 5816 (1927). Further, if "place" in Section 81 is interpreted to mean community rather than the bank office, then Section 36(c)(1) controlling branching within a community would make no sense.

C. The Off-Premise Activities of Appellant Bank Are Prohibited by the Branching Section of the National Bank Act.

The combined effect of the federal branching statute, 12 U.S.C. §36(c) and the Florida branching statute *Fla. Stat.* §659.06, is to prohibit national banks in Florida from branching operations.

To determine what constitutes branch banking, 12 U.S.C. §36(f) must first be reviewed. It states in part as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid or money lent.

The definition uses the word "include", indicating that it is not intended to be a complete definition. This subsection is but one component part of the entire Section 36, the whole of which incorporates state standards for national banks by repeated references to "state law". When viewed in its entirety, Section 36, including the partial definition of branch contained in subsection (f), incorporates state law as the standard for state banks. If Section 36 is to have any meaning, it must be that if a state bank under state law cannot operate a branch, then a national bank in that state in an identical situation likewise cannot operate a branch. The principle of competitive equality is necessarily included in the definition of a branch because Section 36(f) is incomplete on its face, and must incorporate state law in order to give complete meaning and workability to Section 36 as a whole.

As an illustration of the incompleteness of Section 36(f), the record in this case shows that one of the important

functions of Appellant bank's armored car was to deliver cash to its customers for their commercial needs. This delivery of cash is not a "checks paid" transaction as that phrase is commonly understood, yet only banks are engaged in the business of caring for the cash and currency needs of their customers on a regular basis.

However, it is not necessary in the instant case to go outside of the definition in Section 36(f) to find that the off-premise activities of the Appellant bank are within the definition and, therefore, prohibited under Section 36(c). The receptacle and mobile unit readily fit within the description of "branch agency" and "branch place of business". As to receiving deposits, we need go no further than the commonly understood meaning of the language used. The fact situation in the instant case, viewed in substance instead of form, readily fits within the definition without resort to state law. When a customer of the Appellant bank turns over his deposit to the bank employe in the armored car, or places it in the shopping center receptacle to be picked up by the bank employe, the "deposits are received" by the bank. When the customer thus turns over his deposit, he has lost possession and control of it and the bank has received possession and control completely. The "deposits are received" irretrievably at that point, and only bookkeeping entries remain to be made at the office of the bank. Under these circumstances, it could be said that possession and control amount to perhaps 90%, and the bookkeeping at the bank amounts to 10% of the total processing of the deposit. Each part of the process is an indispensable portion of the entire transaction. A deposit cannot be recorded until it is first "received", in the sense that possession and control is taken by the bank's employe. Thus, receiving the deposit in one place and re-

cording it in another adds up to two places of doing the business of banking.

Viewed in another light, the recording portion of the transaction is not necessarily within the definition of Section 36 (f). The whole of Section 36 concerns transacting the business of banking at a place away from the main office of the bank. There are many lawfully operating branches where the "deposits are received", but where the final recording of the deposit on the customer's account is done at the main office of the bank. In this light, the mere receipt of the deposit at a place away from the bank would fit within the definition without final recording at the main office of the bank. Mere possession and control of money or checks in the hands of an agent of the bank, intended by the customer to become a deposit, would satisfy the commonly understood meaning of the words in the definition, without the need to inquire into the legal meaning of "deposit".

In either light, the obtaining of deposits at places away from the bank amounts to branching. This point becomes more clear when normal deposit relationships at the main bank office are viewed. There a customer walks up to the teller's counter, hands over his deposit and obtains a receipt. At this point the "deposit contract" is made by the mere conduct of the parties, the offer of the customer by his act in handing over his deposit, followed by acceptance by the teller in taking possession and control of the deposit. No formal written or oral contract is made at that point, yet the contract is made, without entry of the deposit in the bank's records. The entry is merely evidence of the deposit contract after it is made. In the instant case, the transactions with the bank's messenger are substantially the same, once the legal fictions are removed.

The Supreme Court of Utah had no difficulty in finding that partial or incompleted banking operations conducted away from the bank constitute unlawful branching. In *Continental Bank & Trust Co. v. Taylor*, 14 Utah 2d 370, 384 P. 2d 796 (1963), the court considered the initiating of automobile loans by insurance agents in many locations throughout the state. The bank claimed that these off-premise operations were not restricted by statute, and that in any event the loans were not completed until they reached the bank office. The state statute involved was practically identical with Section 36(f). It stated:

> "The term 'branch' as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent." 384 P.2d at 799.

The Court found that the insurance agents "are in fact agents of the bank in conducting its business * * *" and further stated:

> * * * the Commissioner answers the Bank's question regarding the whereabouts of its "branches" by responding that mobile or door-to-door branch banking is as violative of the statute as though specific street addresses for such "branches" were had.
>
> This Court is inclined to and does agree generally with the contentions of the Commissioner in this case. 384 P.2d at 800.

The Florida statute provides that no off-premises banking is permitted, which is the simplest way of saying that any form of branching is prohibited. Section 36(c) specifically incorporates state law concerning branching. Section 36(f) is broad enough to include the receptacle and mobile unit

and their functions, even without consulting the state law. Thus, national banks operating in Florida are prohibited from engaging in banking away from the bank.

However, Appellants raise the specter that if the off-premise transactions are "branching", then the state supervisor can call any off-premise function branching and thereby interfere with the business of national banks. The facts are that Appellant bank, before the state supervisor issued his letter to it, publically advertised "Full Service Banking at your doorstep * * *" (A. 385), with an armored car described as a "mobile drive in staffed by an armed guard and two tellers * * * where customers may be served, and a communication system". (A. 389) The receptacle was described by the bank as "bringing banking services to you". (A. 387)

What Appellant bank advertised and intended was engaging in the business of banking at many locations away from the bank. Likewise, *Amicus* First National Bank of Cornelia, Georgia, actually is conducting "full service banking" at many places in Georgia, as well as in North Carolina, by the same devices and to the extent that Appellant bank had advertised but did not fully inaugurate due to the pending lawsuit.

This fact situation cannot justify the fears asserted by Appellants and the *Amicus* Georgia bank. Based upon these facts, the decision below is not "open-ended". Even if the definition of branch in Section 36(f) is held to incorporate the state's definition, there are adequate safeguards. A state bank supervisor normally would not restrict the normal and necessary administrative functions of a state bank away from its main office merely to hamper national banks. If he did, the aggrieved national banks, as well as state banks, have a number of court remedies, including the type in the

instant case. If court actions were to prove inadequate, Congress could simply make the definition of branching more precise.

Appellant Comptroller contends that certain listed functions are necessary to national banking, yet could be banned by state supervisors under the decision below. (Brief of Comptroller of the Currency, p. 34.) On analysis, these fears are not justified. For example, "new business solicitation" is not banking *per se*; "loan closings" at the office of the customer or his attorney is a requested and infrequent service; "sale of money orders and travellers checks" and "trust services" certainly need not be conducted at locations away from the bank; "banking by mail" is not denied by any state supervisor to our knowledge; "credit card service" is merely a loan service to the bank's customers which requires use of the mails and is not denied by any state supervisor to our knowledge; "correspondent bank services" are as old as banking, are merely interbank services, not bank-customer services, and have never been considered branching; "data processing" is involved in a petition for a writ of certiorari now pending before this Court and we, therefore, feel it inappropriate to comment upon it.

In short, these expressed fears, upon which Appellants ask this Court to reverse, simply lack substance. The same may be said as to the brief of the *Amicus* Georgia bank. It argues that affirmance by this Court would result in "disparity of treatment of national banks by the various states.". However, this is precisely the intended result of the federal branching statute and the principle of competitive equality. In addition, it overlooks the fact that a state supervisor cannot give a state bank a competitive advantage over a national bank since any state ruling affects banks in both systems equally.

III.

THE EXTENSION OF NATIONAL BANK POWERS BY THE COMPTROLLER OF CURRENCY IS INVALID AND DETRIMENTAL TO THE BANKING INDUSTRY

A. The "Rulings" of the Comptroller of Currency are Invalid.

Appellants attempt to justify the off-premise activities of the Appellant bank, otherwise unlawful under Sections 36 and 81, on the grounds that they are within the incidental powers of the bank, under 12 U.S.C. §24(7). The Section 24 issue is raised in the pleadings in this case. (A. 15, 31) In the proceedings below, the federal Comptroller, in support of his motion for summary judgment, filed an affidavit with the lower court stating, "The operation of messenger and receptacle services is incidental and necessary to the banking business as conducted by national banks today". (A. 184) His legal counsel at Atlanta, Georgia, in a "letter ruling" to the Appellant bank in 1966 stated, "A national bank, as an incident to its banking business, may construct off of its premises a receptacle for the receipt of night bags containing cash and checks". (A. 22)

While the issue of Section 24(7) was raised in the pleadings and argued, the lower court in pre-trial orders "postponed" consideration of this issue. (A. 215, 217, 218) However, the lower court (A. 365 et seq.) and the Court of Appeals (A. 391 et seq.) failed to pass upon this issue.

The "rulings" in the instant case call for a specified type of contract to be made. However, if the contracts call for unlawful activities, the "rulings" themselves are unlawful.

Obligations of a bank created by statute are carried in-

> to, and become a part of, the contract of deposit. However, the bank and the depositor have a legal right to make their own contract or arrangement, *so long as the rights of third parties are not injuriously affected and it is not contrary to law or public policy.* (Emphasis added.)
>
> 10 Am. Jur. 2d Banks §338 (1963);
> *See also* C.J.S. *Banks and Banking* §267 (1938).

The italicized exceptions to the general rule lie at the heart of this case. A bank and its customer cannot by private contract justify conduct otherwise unlawful.

It will be noted that the authorities cite three areas wherein such contracts may be unlawful. Related to the instant case these amount to the following. First, the off-premise banking operations of the Appellant bank are in violation of federal and state law (12 U.S.C. §§ 36 and 81, and *Fla. Stat.* §659.06). Second, this private contract violates public policy, namely, the principle of competitive equality, referred to above and expressed so emphatically in the *Walker Bank & Trust Co.* case, *supra,* note 2. Third, this private contract injuriously affects third-parties, namely, state banks in Florida.

To the extent that the ruling, Par. 7490, defines the normal practice, exemplified by the Brinks agency operations, there is no question of its legality. The difficulty arises because of the words in the ruling that "a national bank may provide messenger service" and because of the practice being permitted thereunder as revealed by the facts in this case and in the Georgia case. This practice is a radical departure from the norm of the true agency operation. Here the bank itself provides the service and is thus extending its operations off-premises in violation of law. To the extent

that the ruling, as construed and applied here, purports to authorize this direct service, it is unlawful.

Ruling 7490 was issued by the federal Comptroller in 1964, following contrary rulings issued by that office in 1953 and 1962 (A. 357-359) stating that armored car service of the type involved here would be in violation of the Section 36 branching law. It was about this time that the federal Comptroller broke with precedent and commenced to issue a series of "rulings" granting national banks new privileges giving them competitive advantages over state banks.[8]

Such attempts have been challenged successfully in the courts in recent cases where the federal Comptroller permitted national banks to underwrite revenue bonds,[9] and to act as an insurance agent.[10]

The federal Comptroller is being challenged in pending cases for permitting national banks to sell shares in a commingled securities fund,[11] to operate a travel agency,[12] and to sell computer services to the public.[13]

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[8]*See, Manual of the Comptroller of the Currency of the United States for National Banks,* e.g., rulings permitting off-premise deposit machines, No. 7491, issued Nov. 1966; off-premise loan production offices, No. 7380, issued Nov. 1966; off-premise payroll service, No. 7485, issued Nov. 1966; off-premise sale of money orders, No. 7500, issued March 1964; operating credit life insurance business, No. 7495, issued March 1964; owning and leasing personal property, No. 3400, issued Nov. 1966; owning and leasing buildings to public agencies, No. 3300, issued Nov. 1966; travel agency service, No. 7475, issued Nov. 1966; acting as general insurance agent, No. 7100, issued June 1963.

[9]Baker, Watts & Co. v. Saxon, 261 F.Supp. 247 (D.D.C. 1966).

[10]Saxon v. Georgia Ass'n of Independent Ins. Agents, 399 F.2d 1010 (5th Cir. 1968).

[11]Investment Co. Institute v. Camp, 274 F.Supp. 624 (D.D.C. 1967), *appeal docketed,* No. 21662, D.C.Cir., Feb. 13, 1968.

[12]Arnold Tours, Inc. v. Camp, 408 F.2d 1147 (1st Cir. 1969), *petition for cert. filed,* 37 U.S.L. Week 3452 (U.S. May 19, 1969) (No. 1407).

[13]Association of Data Processing Serv. Organizations v. Camp, 406 F.2d 837 (8th Cir. 1969), *petition for cert. filed,* 37 U.S.L. Week 3390 (U.S. April 10, 1969) (No. 1246); Wingate Corp. v. Industrial Nat'l Bank, 408 F.2d 1147 (1st Cir. 1969), *petition for cert. filed,* 37 U.S.L. Week 3452 (U.S. May 19, 1969) (No. 1408).

The statements of Comptroller Saxon are revealing as to his intentions in making these "rulings".[14]

> If we find unfilled community needs, or prospective needs, which could profitably support the expansion of banking facilities, we feel obliged to allow this gap to be filled in the public interest. This is the only standard we believe we may properly apply. The State authorities may properly apply other and different standards according to their own concepts of the role of State-chartered banks.[15]
>
> * * * * *
>
> We believe that if there is to be true dual ability that the two systems ought to operate in all substantive respects, the one independent of the other.[16]

As to branching, Comptroller Saxon stated:

> The standards which should govern the branching powers of national banks are not, in my judgment, the varied standards which are appropriate to meet the local needs of the 50 individual states.[17]

Thus, Comptroller Saxon plainly disagreed with the national policy of competitive equality established by Congress. His views continue under his successor, present Comptroller Camp. Addressing bankers in Texas, where, like Florida, all branch banking is prohibited, Mr. Camp, commenting on banking opportunities, stated:

> "In these circumstances, branching is the only proper means of meeting consumer needs and existing banks

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[14]*See, Conflict of Federal and State Banking Laws,* Hearings before the Committee on Banking and Currency, 88th Cong., 1st Sess. (1963).
[15]*Supra,* n. 14 at pp. 280, 281.
[16]*Supra,* n. 14 at p. 397.
[17]*Supra,* n. 14 at p. 24.

are in the best position to meet the initial developmental costs in new markets."[18]

Not only does the federal Comptroller by "rulings" grant national banks advantages over state banks, but also advises non-branching states to change their laws to permit branching, thereby automatically obtaining branching privileges for national banks under Section 36(c).

In the period from 1962 to 1968, under Comptrollers Saxon and Camp there were twenty-nine reported federal court decisions challenging their permission for national banks to branch which involved conflicts with state law. In almost all of them, the aggrieved state banks or state supervisors prevailed. These cases reveal an unprecedented defiance of branching statutes by the federal Comptroller. In contrast, there were only ten reported cases of this type from 1927 (when Section 36 was enacted) to 1962.[19]

From the federal Comptroller's record in recent years, there emerges an unmistakable objective to create an independent national banking system, free as possible from state standards, particularly as to branching. This objective can be attained in only two ways—indirectly, by breaking down state restrictions in the manner we are witnessing, or directly, by reversing national policy by statutory changes. The latter course being obviously impossible, the federal comptroller is attempting the indirect route by issuing "rulings". The effect of this course of conduct is to usurp the power of Congress to establish national banking policy.

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[18]Speech of Comptroller Camp to the Texas Bankers Association, San Antonio, Texas, May 14, 1968; *see also* speech of Comptroller Saxon to the Florida Bankers Association, Miami Beach, Florida, March 22, 1963. Both speeches available at the Office of the Comptroller in mimeo form.

[19]*See* annotations under 12 U.S.C. §36(c).

B. Branch Banking Accelerates Concentration of Banking Control.

If the philosophy of the federal Comptroller were to prevail, widespread branching would have profound effects on the structure of banking and the economy.

Branching is the fastest means to concentration of control of banking, far outrunning bank mergers and bank holding companies.[20] The process accelerates when mobile units and shopping center receptacles are used. These devices provide a multiplicity of locations for gaining deposits, at far less cost than brick and mortar branches at fixed locations.

Almost two-thirds of all banking assets in the country are held by branch bank systems.[21] In 1921 only 5% of all bank offices were branches; in 1964 branches accounted for about 50% of all bank offices.[22] Of about 14,000 banks in the United States, 100 have 47% of all bank deposits.[23] The concentration due to branching occurs in those states which permit it, and the percentage goes higher where more branching is permitted.

Appendix A to this brief provides vivid illustrations. In this latest table of the Federal Deposit Insurance Corporation, the total bank deposits in the 5 largest banks in each state is shown. The table is divided into 3 categories according to the laws of the states regarding branching, as follows:

> Statewide Branching (16 states)—5 largest banks control from 48 to 93% of all bank deposits.
>
> Limited Area Branching (16 states)—5 largest banks control from 22 to 55% of all bank deposits.

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[20]Staff of House Select Committee on Small Business, 86th Cong., 2d Sess., Report on Banking Concentration and Small Business (Comm. Print 1960).

[21]*Supra*, n. 20 at p. 8.

[22]*Supra*, n. 20 at p. 21 and 1964 FDIC Annual Report.

[23]*Supra*, n. 14 at p. 40.

Unit Banking Prevalent (18 states)—5 largest banks control from 16 to 42% of all bank deposits.

Concentration of deposits in fewer and fewer hands has adverse effects upon competition in banking. The large banks in a statewide branching state have a decided competitive advantage. They have the means to maintain massive advertising programs on behalf of all of the bank offices within the system. In contrast, unit banks, each having a small advertising budget, cannot compete effectively for new deposit accounts. The larger banks also have the means to seek out and establish new branch facilities in promising areas. Smaller banks have less capacity to run in this race. Thus, larger banks acquire most of the profitable locations, and can sustain their rapid growth by use of all the promotional media. Thus, bigness begets bigness, and the trend to concentration marches on.

The effects of banking concentration in the economy are subtle and not readily apparent. Alternate sources of credit are reduced, gradually but steadily. There are two main reasons for this. The tendency of bank supervisors, where permitted, is to charter branches of existing banks, rather than to charter new banks, and the number of banks in those states is reduced by merger as unit banks are converted to branches of larger banks. In fact, 85% of all bank mergers result in branches.[24] The result of this process is more bank offices, but fewer banks.[25]

Reduction of alternate sources means less availability of loans at fair rates that only bank competition can provide.[26]

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[24]*Supra*, n. 14 at p. 21.

[25]Staff of Board of Governors of Federal Reserve System, Senate Select Committtee on Small Business, 87th Cong., 2d Sess., Report on Recent Developments in the Structure of Banking (Comm. Print 1962).

[26]"Therefore, all things being equal, any reduction in the number of

A service area having 2 banks with 20 branches affords 2 sources of credit, not 22. Judgment on loans is in the final control of a distant main office manager. This often works to the disadvantage of the smaller borrower.[27]

Congress has shown great concern with banking concentration, its effect on the economy, and the causes and controls of the trend. It has enacted a Bank Holding Company Act[28] and a Bank Merger Act.[29] These acts control both national and state banks. As to branching, Congress since 1927 continues to defer to control by the states, over banks in both systems via *12 U.S.C.* §36. *This is a significant facet of the instant case.* If state control of the permissible extent of branching is curtailed by the decision here, no other control of this fastest vehicle for concentration will be available. The antitrust laws might be used in some branch-by-merger cases, but not as to de novo branching which is a form of internal expansion not involving acquisitions.

Beyond the experience in this country of the effects of banking concentration, the countries of Western Europe provide an image of the ultimate result. In each of those countries there is a handful of banks and thousands of branches. This concentration took place over the years for lack of any effective controls. Hand-in-hand with this trend in Europe,

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banks in a given market area or any feature of concentration such as *the growth of branch banking systems or holding company systems will tend to diminish competition in that area* and make it more difficult for a given businessman to secure loans.* * * It is obvious, then, that in the banking market the existence of alternative sources of supply for the would-be borrower is of the utmost importance". (*Supra*, n. 20 at p. 6).

[27]Congress recognized these facts when debating the McFadden Act. *See*, 67 Cong. Rec. 2850, 3248 (1927).

[28]12 U.S.C. §1841 et seq. For purpose of the Act see H.R. Rep. No. 609, 84th Cong., 1st Sess. (1955); S. Rep. No. 1095, 84th Cong., 2d Sess. 10 (1956).

[29]12 U.S.C. §1828(c). For purpose of the Act see H.R. Rep. No. 1416, 86th Cong., 2d Sess. 5, 9 (1960).

small business disappeared and cartels and combinations in commerce and industry developed. The large bank systems there found it more profitable and convenient to make one large loan to a cartel, than to make many smaller loans to small businesses.

As a result, small business largely disappeared for lack of needed bank credit, while large businesses and cartels prospered.[30]

In contrast, the United States literally is the only country remaining which has a significant segment of small business and industry within its economy. The most important support for small business is a competitive banking system. Removal of this support could lead to a result here of the type observed in Western Europe and elsewhere.

There are other implications. Where there is a strong segment of smaller business and competitive banking, there is a stabilizing balance wheel in the economy to prevent violent political swings from left to right as we have observed in other countries.

In this country, the economy varies by region and state. In many areas there are admixtures of commerce and agriculture, industry and mining. Communities and regions

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[30]Congress made note of this development in one of its reports on the need for holding company legislation:

> "Your Committee should like to re-emphasize the fact that this is the only country left where most communities are served by home-owned and home-managed banks which are aware of and responsive to the needs of the people of their areas. Our independent banking system has been a vital factor in the development of the United States.* * * Other countries must depend on 3, 4, or 5 banks having up to thousands of branches. Policies and important credit decisions are made hundreds or thousands of miles from many of the branches. The interest of an enterprising local customer may run counter to that of a large main office account, in which event the former might suffer. This inevitably tends toward concentration in all lines, cartels, the stifling of new enterprises, and stagnation. . ." (H.R. Rep. No. 609, *supra*, n. 29 at p. 6). *See also* 102 Cong. Rec. 6857 (1956).

are products of geography, resources, climate, and even tradition, all affecting the nature of their local economies and banking structure.

From the beginning, we have believed as a nation in the principles of economic and governmental diffusion. We respect local autonomy and legislate against centralization and monopoly. We believe it is inherently more beneficial and safer to have judgments in our economic and political lives made by many, rather than a few.

In many states the belief is held that it is wise policy to maintain dispersion of bank power, and to depend upon new bank chartering to supply bank needs to developing areas. This policy assures smaller borrowers availability of credit at fair rates that competition provides. It gives the same assurance to larger borrowers, through the correspondent banking system whereby larger money-center banks provide loans and services directly to such customers or indirectly by loan participations with smaller local banks which initiate and service the loans. In these states, branching is prohibited or restricted.

States, like Florida, desiring to maintain a favorable environment for small business and competitive banking, by means of prohibiting branch banking, have the right to do so. And, having such a policy, Florida is entitled by federal law to have it respected by national banks within it borders. The Florida legislature, rather than the federal Comptroller, is best able to judge what type of banking structure is best for the state's economy.

It requires little imagination to envision what will happen in Florida if this Court reverses. The larger national banks, having the means to launch, maintain, and promote rolling branches would soon dominate the banking market in the

state. Deposits are the means to all ends in banking. Gaining deposits by unrestricted and unregulated use of rolling branches by national banks would soon force state banks to convert to national charters. Ultimately, the legislature would be forced to change its branching laws to save its state bank system.

Appendix A to this brief shows that the 5 largest banks in Florida have only about 15% of the total bank deposits in the state as compared, for example, with Nevada's 93%, Arizona's 92%, Oregon's 87%, California's 78%, Idaho's 86%, and Washington's 72%.

Florida wants to stay out of this high concentration category. It has made the judgment that unit banking is best suited to its unique economy. It has rejected pressure from large national banks for branching laws in every recent session of its legislature, pressures encouraged by the federal Comptroller in speeches there, (*supra*, n.19), and by "rulings" designed to circumvent its antibranch laws.

Florida is entitled to vindication of its judgment and to protection against a federal administrator intent upon changing its banking structure.

CONCLUSION

Amici associations urge that the judgment of the Fifth Circuit Court of Appeals be sustained.

Should Appellants' position prevail, the implications are ominous. National banks would then be free to use such off-premise devices to obtain deposits statewide and even across state lines, all without restriction or regulation because of the pretense that these devices are the agencies of the customers of the bank. If these practices are approved and become widespread, the principle of competitive equality

will become a nullity, the effectiveness of state banks as competitors will be drastically reduced, and we will have creeping centralized banking.

This case illustrates that competitive equality will function in fact only if the Comptroller of the Currency administers his office in conformity with the federal statutes. If fundamental changes in national bank policy are desirable or necessary, they should be addressed to Congress which alone can establish bank policy.

Respectfully submitted,

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APPENDIX A

RELATIVE SIZE OF LARGEST COMMERICAL BANKS OR BANK GROUPS IN STATES CLASSIFIED BY STATUS OF BRANCH BANKING DECEMBER 31, 1967

STATE[1]	Percentage of deposits of all Commercial banks in - - Largest bank	Largest three banks	Largest five banks	Percentage of deposits of all Commercial banks in - -[2] Largest bank or bank group	Largest three banks or bank groups	Largest five banks or bank groups
States with statewide branch banking prevalent:						
Nevada	49.3%	76.3%	93.1%	54.8%	81.8%	91.1%
Rhode Island	51.4	87.9	93.9	51.4	87.9	93.9
Arizona	45.1	82.2	92.4	45.1	89.9	94.1
Delaware	36.5	75.7	91.5	36.5	75.7	91.5
Oregon	42.5	84.6	87.0	42.5	84.6	87.0
Hawaii	39.4	78.7	90.2	39.4	78.7	90.2
California	38.3	60.5	78.1	38.3	60.5	78.1
Idaho	34.9	77.4	86.3	34.9	77.4	86.3
Washington	32.5	59.9	72.2	32.5	59.9	72.2
Utah	30.2	60.7	71.6	31.2	61.7	72.6
Alaska	32.1	66.6	82.2	32.1	66.6	82.2
So. Carolina	22.8	45.5	55.2	22.8	45.5	55.2
No. Carolina	21.1	50.5	66.4	21.1	50.5	66.4
Maryland	19.0	41.6	60.5	19.0	41.6	60.5
Connecticut	18.7	43.8	57.0	18.7	43.8	57.0
Vermont	13.4	34.9	47.7	13.4	34.9	47.7

[1] Classification of States by prevalent type of bank organization as of December 31, 1958, described in Table 23 of the Annual Report of the Federal Deposit Insurance Corporation for 1960, p. 45.

[2] Figures for bank groups are the deposits of banks in each State controlled by a holding company registered under the Bank Holding Company Act of 1956, plus one group controlled through common stock ownership included for comparability with data for earlier years, treated for each case as though they were a bank and branches in the State.

RELATIVE SIZE OF LARGEST COMMERICAL BANKS OR BANK GROUPS IN STATES CLASSIFIED BY STATUS OF BRANCH BANKING DECEMBER 31, 1967

STATE[1]	Percentage of deposits of all Commercial banks in - - Largest bank	Largest three banks	Largest five banks	Percentage of deposits of all Commercial banks in - -[2] Largest bank or bank group	Largest three banks or bank groups	Largest five banks or bank groups
States with limited area branch banking prevalent:						
Massachusetts	28.0%	45.9%	55.9%	28.0%	49.3%	66.1
Michigan	18.1	37.6	48.9	18.1	37.6	48.9
Georgia	17.2	37.5	46.2	20.2	44.7	53.4
New Mexico	16.8	35.2	43.8	16.8	41.1	47.5
New York	16.7	41.6	57.6	16.7	41.6	57.6
Alabama	14.2	26.1	34.8	14.2	26.1	34.8
Louisiana	11.3	23.8	32.3	11.3	23.8	32.3
Maine	14.3	33.6	48.3	15.1	34.4	49.1
Pennsylvania	13.7	28.1	39.4	13.7	28.1	39.4
Mississippi	13.9	28.7	32.7	13.9	28.7	32.7
Ohio	10.9	22.9	29.8	10.9	23.2	32.8
Kentucky	10.7	25.9	34.1	10.7	25.9	34.1
Tennessee	10.4	28.5	40.4	10.4	28.5	40.4
Virginia	10.0	26.2	36.3	14.3	34.1	46.6
Indiana	9.4	23.0	28.1	9.4	23.0	28.1
New Jersey	6.0	15.7	22.8	6.0	15.7	22.8

[1]Classification of States by prevalent type of bank organization as of December 1958, described in Table 23 of the Annual Report of the Federal Deposit Insurance Corporation for 1960, p. 45.

[2]Figures for bank groups are the deposits of banks in each State controlled by a holding company registered under the Bank Holding Company Act of 1956, plus one group controlled through common stock ownership included for comparability with data for earlier years, treated for each case as though they were a bank and branches in the State.

RELATIVE SIZE OF LARGEST COMMERICAL BANKS OR BANK GROUPS IN STATES CLASSIFIED BY STATUS OF BRANCH BANKING DECEMBER 31, 1967

STATE[1]	Percentage of deposits of all Commercial banks in - - Largest bank	Largest three banks	Largest five banks	Percentage of deposits of all Commercial banks in - -[2] Largest bank or bank group	Largest three banks or bank groups	Largest five banks or bank groups
States with unit banking prevalent:						
Illinois	15.9%	36.3%	42.7%	15.9%	36.3%	42.7%
Colorado	14.7	34.5	43.7	14.7	36.2	47.4
Wisconsin	12.8	21.6	25.0	17.4	31.1	33.7
Nebraska	11.6	24.2	34.6	11.6	28.3	38.7
No. Dakota	8.3	15.6	21.7	16.4	40.1	49.9
Minnesota	10.7	29.4	33.2	29.9	56.5	60.9
Wyoming	9.2	23.7	32.5	16.3	33.5	43.0
Oklahoma	11.0	28.1	37.6	11.0	28.1	37.6
Missouri	10.1	23.9	30.9	8.3	23.9	30.9
So. Dakota	8.3	21.4	32.3	22.8	38.6	44.0
Texas	6.5	17.5	24.5	6.5	17.5	24.6
Florida	6.4	11.6	15.5	8.8	20.6	27.0
Kansas	6.1	12.3	17.0	6.1	12.3	17.0
Arkansas	6.6	15.7	21.4	6.6	15.7	21.4
New Hampshire	7.1	18.2	26.8	16.8	27.8	36.5
West Virginia	5.7	14.4	19.4	5.7	14.4	19.4
Montana	5.9	14.8	22.4	28.8	50.4	59.1
Iowa	4.7	11.1	16.1	6.4	12.8	18.1

[1] Classification of States by prevalent type of bank organization as of December 31, 1958, described in Table 23 of the Annual Report of the Federal Deposit Insurance Corporation for 1960, p. 45.

[2] Figures for bank groups are the deposits of banks in each State controlled by a holding company registered under the Bank Holding Company Act of 1956, plus one group controlled through common stock ownership included for comparability with data for earlier years, treated for each case as though they were a bank and branches in the State.

APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

April 4, 1969

Horace R. Hansen, Esq.
Hansen, Hazen, Dordell & Bradt
600 Degree of Honor Building
Saint Paul, Minnesota 55101

Re: First National Bank of Plant City v. Dickinson, Oct. 1968 Term No. 777

Dear Mr. Hansen:

Pursuant to Rule 42 of the Supreme Court Rules, petitioner hereby consents to the filing of a brief *amicus curiae* in this case on behalf of the Independent Bankers Association of America and Western Independent Bankers.

Very truly yours,

ERWIN N. GRISWOLD,
Solicitor General.

B 2

OFFICE OF COMPTROLLER
STATE OF FLORIDA
Tallahassee
32304

April 7, 1969

Horace R. Hansen, Esquire
Attorney at Law
600 Degree of Honor Building
Saint Paul, Minnesota 55101

Re: Camp v. Dickinson; First National Bank in Plant City v. Dickinson et al; in the U. S. Supreme Court.

Dear Mr. Hansen:

On behalf of Comptroller Fred O. Dickinson, Jr. please be advised that consent is granted to the filing of amicus curiae brief on behalf of Independent Bankers Association of America and Western Independent Bankers in the above reference cases.

With best wishes, I am

Sincerely,

FRED O. DICKINSON, JR.
Comptroller of Florida.
V. CARROLL WEBB,
General Counsel.

VCW/jh

B-3

Law Offices
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER
Tampa

April 7, 1969
Horace R. Hansen, Esq.
600 Degree of Honor Bldg.
Saint Paul, Minnesota 55101

Re: Camp v. Dickinson; First National Bank in Plant City v. Dickinson et al; in the U. S. Supreme Court

Dear Mr. Hansen:

I respond to your letter of April 2. This letter will serve as the consent of the Comptroller of the State of Florida, the Hillsboro Bank, the Peoples Bank of Lakeland and the First Ruskin Bank for you to file an amicus curiae brief in the captioned matters jointly in behalf of the Independent Bankers Association of America and Western Independent Bankers.

Very truly yours,

WM. REECE SMITH, JR.

WRS, Jr:ad

Law Offices
EDWARDS AND SAWYER
107 South Evers Street
Plant City, Florida 33566

April 29, 1969

Mr. Horace R. Hansen
Hansen, Hazen, Dordell & Bradt
Attorneys at Law
Saint Paul, Minnesota 55101

Re: The First National Bank in Plant City v. Dickinson, et al—U. S. Supreme Court—No. 777

Dear Mr. Hansen:

This will acknowledge receipt of your letter requesting my consent on behalf of The First National Bank in Plant City to your filing on behalf of the Independent Bankers Association of America a brief as amicus curiae pursuant to Rule 42 of the United States Supreme Court.

Please be advised that The First National Bank in Plant City does consent to your filing briefs as suggested.

Very truly yours,

EDWARDS AND SAWYER
By Robert S. Edwards.
mo
cc: Office of the Solicitor General
Wm. Reece Smith, Jr., Esquire
V. Carroll Webb, Esquire

FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 1 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~111~~ 19

THE FIRST NATIONAL BANK IN PLANT CITY, FLORIDA,
Petitioner,

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. ~~692~~ 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

Brief On Behalf Of
The National Association Of Supervisors Of State Banks
As Amicus Curiae

JAMES F. BELL
BRIAN C. ELMER
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

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Superintendent of Banks, Alabama

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Honorable Franklin J. Stowell
Superintendent of Banks, Arizona

Honorable Harvel C. Adams
Bank Commissioner, Arkansas

Honorable James M. Hall
Superintendent of Banks, California

Honorable Harry Bloom
State Bank Commissioner, Colorado

Honorable Philip Hewes
Bank Commissioner, Connecticut

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Honorable E. G. Adams
Commissioner of Banking, Kentucky

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State Bank Commissioner, Louisiana

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Honorable Carl B. Sebring
Bank Commissioner, Oklahoma

Honorable J. F. M. Slade
Superintendent of Banks, Oregon

Honorable G. Allen Patterson
Secretary of Banking, Pennsylvania

Honorable Angel M. Rivera
Secretary of the Treasury, Puerto Rico

Honorable Robert V. Bianchini
Bank Commissioner, Rhode Island

Honorable Robert C. Cleveland
Chief Examiner, State Board of Bank Control, South Carolina

Honorable Charles Seaman
Superintendent of Banks, South Dakota

Honorable Marvin A. Bryan
Superintendent of Banks, Tennessee

Honorable J. M. Falkner
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Vermont

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Supervisor of Banking, Washington

Honorable M. Woodrow Smith
Commissioner of Banking, West Virginia

Honorable Roger L. Heironimus
Commissioner of Banks, Wisconsin

Honorable Dwight D. Bonham
State Examiner, Wyoming

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 777

THE FIRST NATIONAL BANK IN PLANT CITY, FLORIDA,
Petitioner,

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

Brief On Behalf Of The National Association Of Supervisors Of State Banks As Amicus Curiae

---

This brief, filed with the written consent of all Petitioners, is submitted on behalf of the 50 officials of state governments responsible for the supervision of state-chartered banking institutions in every state of the United States, and their counterparts in Puerto Rico and the

Virgin Islands. Together they form the membership of the National Association of Supervisors of State Banks.[1]

As of December 31, 1968, there were 9,483 commercial and savings banks chartered under state laws, with total resources of approximately 278 billion dollars, subject to the Supervisors' jurisdiction.

QUESTION PRESENTED

Whether, for the purposes of the reference in 12 U.S.C. § 36 to state law as determining whether a national bank may establish a "branch," the determination of what banking activities amount to a "branch" is governed exclusively by federal law based upon the definition of a "branch" in that section, or also includes other banking activities held to be an unlawful "branch" under state law.

STATUTES INVOLVED, STATEMENT OF THE CASE

The statutes involved and statement of the case are as set forth in the Respondents' brief on the merits.

INTRODUCTION

The Supervisors have a critical interest in this case. Its disposition will decide the extent of competitive equality between national and state banks in the matter of branching, upon which the vitality of the dual banking system rests.

Section 36(c) establishes state law as the standard for branching of national banks. In this way Congress left to the individual states the resolution of the extent to which branching should be permitted in order to reflect

---

[1] The Supervisors formed the sole membership of the Association from its founding in 1902 until 1958. At that time state banks were invited to join as "associate" members. There are currently 4,642 such associate members, representatives of whom advise and assist the Board of Directors. The Board consists entirely of Supervisor members and has sole authority to supervise the Association's affairs and determine its policies.

different local conditions and branching policies. Had Congress elected to permit the establishment of branches of national banks without regard to state law, there would shortly have been a single standard based on federal law for branching for all banks, state as well as national. This is so because state legislatures would have been forced to conform their branch laws to national policy, inasmuch as no state bank could survive in competition with a national bank having authority to establish branches not permitted to state banks.

There are arguments on both sides of the branching question—an issue which has been debated ever since branching emerged as a significant factor during the first two decades of this century.[2] Briefly, proponents of branching allege a greater efficiency for banks permitted to branch than for non-branching or "unit" banks. They claim that branching leads to larger banks able to provide larger loans needed by commerce and industry, and a more extensive range of services to the public than can often be provided by smaller unit banks. Opponents of branching, however, fear economic concentration as a result of branching and assert that the public interest is best served by the unit banking system.[3]

---

[2] There were 87 banks operating branches in the country by the turn of the century, and 292 by 1910. This number almost doubled, to 530, by 1920. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING STUDIES 428 (1941). Between 1900 and 1920 the percentage of loans and investments of all banks controlled by branch institutions grew from 2% to 15%. FISCHER, AMERICAN BANKING STRUCTURE 30 (1968)

[3] For arguments in favor of branch banking see the address of Comptroller Saxon entitled "The Role of Branch Banking" inserted in the record of *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State laws*, 88th Cong., 1st Sess., 371-375 (1963). For arguments opposing branch banking see testimony of witnesses from the Independent Bankers Association, *Id.* at 16-25. See, also, FISCHER, *supra* note 2, at 8; KOHN, BRANCH BANKING, BANK MERGERS AND THE PUBLIC INTEREST (1964); Shull and Howitz, *Branch Banking and the Structure of Competition*, 1 NAT'L BANKING REV. 301

Legislatures of the 50 states have acted differently on the issue of branching and have enacted laws reflecting their own resolution of the branch versus unit banking question. Twelve states permit unlimited branching throughout the state.[4] Fifteen states prohibit branching altogether, although several of these permit off-premise offices with limited powers (e.g., paying and receiving stations, generally called "tellers' windows").[5] The remaining 23 states adopt a middle ground with widely varying restrictions.[6] Thus, they may offer some of the benefits

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(1964); INDEPENDENT BANKERS ASS'N, INDEPENDENT BANKING: AN AMERICAN IDEAL (1965); *Branch Banking: The Debate Continues*, BANKING, July 1961, at 14. Kaufman, *Bank Market Structure and Performance*, 32 SOUTHERN ECON. J. 429 (1966); and Benston, *Branch Banking and Economics of Scale*, 20 J. OF FINANCE 312 (1965).

[4] ALASKA STAT. § 06.05.415 (1962); ARIZONA REV. STAT. § 6-223 (1956); CAL. FINANCIAL CODE § 500 (1964); DEL. CODE ANN., tit. 5, § 770 (Supp. 1969); HAWAII REV. STAT. § 403-53 (1968); IDAHO CODE § 26-1001 (1968); MD. CODE ANN. art. 11, § 65 (1968); NEV. REV. STAT. § 660.010 (1967); N. C. GEN. STAT. § 53-62 (Supp. 1967); R. I. GEN. LAWS § 19-1-13 (1968); S. C. CODE § 8-57 (1962); and VT. STAT. ANN. tit. 8, §§ 501 to 505 (1958), as amended, § 502a (Supp. 1968).

[5] ARK. STAT. §§ 67-205, 67-340 to 67-352 (1966); COLO. REV. STAT. § 14-3-1 (1963); FLA. STAT. § 659.06 (1966)*; ILL. REV. STAT. ch. 16-1/2, §§ 105, 106 (Supp. 1969)*; IOWA CODE § 528.51 (1969); KAN. STAT. ANN. § 9-111 (Supp. 1969)*; MINN. STAT. ANN. § 48-34 (1946); MO. STAT. ANN. §§ 362.105, 362.107 (1968); MONT. REV. CODE § 5-1028 (1968)*; NEB. REV. STAT. § 8-157 (Supp. 1967)*; N. D. CODE §§ 6-03-15 to 6-03-19 (1959), § 6-03-14 (Supp. 1969); OKLA. STAT. tit. 6, §§ 501, 1061 (1966); TEX. CIV. STAT. ANN. art. 342-903 (Supp. 1969); W. VA. CODE ANN. § 3131 (1961); Wyo. (no statute relating to branching, which fact has been construed as prohibiting branching). (Asterisks indicate outside tellers' windows permitted.)

[6] ALA. CODE tit. 5, §§ 125, 125(1) (1960); CONN. GEN. STAT. ANN. § 36-59 (1969); GA. CODE ANN. § 13-203.1 (Supp. 1968); IND. STAT. ANN. § 18-1707 (1964); SUPP. KY. REV. STAT. § 287.180 (Supp. 1968); LA. REV. STAT. ANN. §§ 6:54 to 6:56, 6:244 (1951); ME. REV. STAT. ANN. tit. 9, § 1003 (Supp. 1969); MASS. GEN. LAWS ch. 172, § 11 (Supp. 1968); MICH. STAT. ANN. § 23.762 (1957); MISS. STAT. ANN. §§ 5226 to 5236 (1956), as amended § 5228 (Supp. 1966); N. H. REV. STAT. ANN. § 384-B:2 (1968); N. J. STAT. ANN. § 17:9A-19 (Supp. 1969); N. M. STAT. ANN. §§ 48-2-16 to 48-

of branching, while at the same time protecting small unit banks throughout a state from branching by large city banks, through a restriction of branching to the city and/or county of the head office of a bank, and/or its contiguous counties, or to a specified mileage radius of the head office. Additionally, or alternatively, they may adopt a standard of a minimum population of a geographical area in which a branch may be established, or permit branching only in an area in which no unit bank is located.

There is today, therefore, "competitive equality" in the matter of branching based upon state law. Both classes of banks—state and national—are bound by the same rules which are tailored, state by state, to meet differing economies as well as divergent philosophies on the issue of branch versus unit banking.[7] There is also considerable flexibility and protection in the system. Either or both classes may apply to the state legislature at any time to seek expansion or modification of existing branch statutes. Indeed, in just the past six years one third of the states have amended their statutes to reflect changing economic conditions or attitudes.[8]

2-19 (1966); N. Y. BANKING LAW § 105 (Supp. 1969); OHIO REV. CODE ANN. 1111.02 to 1111.06 (1968); ORE. REV. STAT. § 714.050 to 714.990 (1963); PA. STAT. ANN. tit. 7, § 904 (1967); S. D. COMP. LAWS 51-8-1 to 51-8-7 (1967); TENN. CODE ANN. § 45-211 (1964); UTAH CODE ANN. § 7-3-6 (Supp. 1967); VA. CODE §§ 6. 1-26 to 6. 1-29.1 (1966); WASH. REV. CODE § 30.40.020 (1961); WIS. STAT. ANN. § 221.04 (Supp. 1968).

[7] In general, statewide branching is to be found primarily in the west; prohibited branching between the Mississippi and the Rockies; and limited branching (with a number of exceptions, such as Florida), in the eastern third of the United States. *Supra* notes 4-6, FISCHER, *supra* note 17, at 66-67.

[8] In the past six years *Wisconsin* (1967) and *New Hampshire* (1963) moved from the non-branching to the limited branching category. States with limited branching liberalized their restrictions in a numbers of respects: *Alabama* extended the areas in which branches can be established each year between 1963 and 1967; *Georgia* and *Hawaii* extended the number of branches that can be estab-

Between the time of the formulation of Section 36(c) in the McFadden Act of 1927 and the Banking Act of 1933, and the administration of Comptroller Saxon beginning in 1961, little difficulty was experienced with the foregoing meshing process in our federalism.[9] Comptroller Saxon, however, radically changed the direction of the Comptroller's office. A vigorous advocate of a uniform standard for branching set by Congress which would

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lished at certain locations in 1967; *Indiana* decreased population minimums for cities in which branches can be located in 1963; *Kentucky* eliminated a restriction on branching in adjacent counties only if there is no existing bank in 1966; *New York* amended its intra-district branching pattern to eliminate the restriction on branching to a city or village in 1968, and eliminated population minimums in 1964. Most of the non-branching states permitted or increased the authority to provide service through off-premise "tellers' windows" or adjacent facilities: *Arkansas* (1965); *Florida* (1965); *Illinois* (1965); *Oklahoma* (1965); *Kansas* (1967); *Montana* (1963); *Nebraska* (1963); *North Dakota* (1963) and *Texas* (1963). For statutory citations see *supra* notes 5 and 6.

[9] There was a virtual void in litigation wherein a state bank challenged a branch decision of the Comptroller and, indeed, none whatever prior to 1958. See annotations following 12 U.S.C.A. 36(c). Further, there was an affirmative cooperative working relationship between the Supervisors and the Comptroller's office relating to an interchange of information on branch filings, and a program for processing competitive applications of national and state banks for a branch at a location where under state law only one branch could be located, *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied* 358 U.S. 830 (1958), and *Bank of Sussex* v. *Saxon*, 251 F.Supp. 132, 138-9 (D.N.J. 1966), which the cited cases held to be within the scope of Congressional intent in the administration of Section 36 of the National Bank Act. For examples of the principle of competitive equality in national bank authorizations before Mr. Saxon, which were changed by him, see *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State Banking Laws*, 88th Cong., 1st Sess. 104, 105, 124, 132-134 and 198 (1963). For expressions of the acceptance of the principal of competitive equality by prior Comptrollers, see *Hearings Before the Senate Committee on Banking and Currency on the Study of Banking Laws*, 84th Cong., 2d Sess. 27 (1956); *Hearings Before the House Committee on Banking and Currency on the Financial Institutions Act of 1957*, 85th Cong., 1st Sess. 160 (1957).

permit national banks to branch statewide,[10] and restless with branching restrictions in state law applicable to national banks,[11] he began a vigorous program to test the perimeters of his authority to authorize branches of national banks. This action resulted in a veritable deluge of litigation,[12] and, in particular, his claim that he was only bound by certain portions of state branch law engendered this Court's decision in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), that the Comptroller could not "pick and choose what portion of the law binds him." (*Id.* at 261) However, the controversy is by no means at an end. The Comptroller's office continues to test the perimeters of the *Walker Bank* case,[13] as well as to explore other avenues to avoid restrictions in state branch law.[14]

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[10] *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State Banking Laws*, 88th Cong., 1st Sess., 371-375 (1963) (address by Comptroller Saxon inserted in the record).

[11] "The branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual states find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers and the Dual Banking System*, 101 COMPT. CURRENCY ANN. REP. 316, 318 (1963).

[12] See annotations following 12 U.S.C.A. 36(c).

[13] "The task of the Court in resolving the conflicting contentions of the parties is made unnecessarily difficult by reason of the failure of the Comptroller to accept his clearly defined responsibility in processing applications to establish branch national banks. For some unsatisfactorily explained reason, he insists . . . that he is only bound by 'capital' and 'location' restrictions of State law in considering applications of national banks to establish branches. This argument is made in the face of the recent decision of the Supreme Court in [the *Walker Bank* case]." *First Citizens Bank & Trust Co.* v. *Camp*, 281 F.Supp. 786, 789 (E.D.N.C. 1968), *aff'd.* Civ. No. 12552 (4th Cir., May 13, 1969).

[14] The courts have struck down as "clever devices of evasion" efforts of the Comptroller to permit a national bank to move its main office to the location of a branch site forbidden under state law, while retaining its old banking house as a "branch." *American Bank & Trust Co.* v. *Saxon*, 373 F.2d 283, 291 (6th Cir. 1967);

In particular, and coming to the central issue in this case, the position taken by the Comptroller that he is completely immunized from state branch statutes under Section 36(f) of the Act has resulted in national banks being permitted off-premise activities prohibited to state banks under some state branch statutes. This has occurred in three ways.

First, the development of parking congestion in downtown areas after World War II resulted in the development of "drive-in" and similar facilities adjacent to, or near, an existing banking office. The question arose as to whether these facilities were simply extensions of an existing banking office or a "branch" either prohibited by, or requiring approval under, state branch law. Rulings were made by various state attorneys general of the states construing state branch statutes on this point and, initially, any problem of competitive inequality between state and national banks was avoided by the Comptroller's office permitting national banks operating in those states to establish offices "similar to those permitted state-chartered banks under the respective opinions of the Attorneys General," with but two exceptions. 93 COMPT. CURR. ANN. REP. 13 (1955). More recently, however,

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Bank of Dearborn v. *Saxon*, 377 F.2d 496, 498 (6th Cir. 1967). Further, on the grounds that savings and loan associations conduct the "banking" business within the meaning of the definition of "state bank" in Section 36(h) of the National Bank Act, and that Section 36(h) is completely immunized from state law, the Comptroller has held that a national bank may branch in a state which prohibits state banks from establishing branches but which permits savings and loan associations to branch. *American State Bank* v. *Camp*, Civil No. 182-66 (D.D.C.) (case subsequently dismissed June 24, 1968, by withdrawal of application by the national bank). On this latter point see *Nuesse* v. *Camp*, 385 F.2d 694, 705 (D.C. Cir. 1967), where, in permitting the Wisconsin State Bank Supervisor to appear in the *American State Bank* case, the court said: "Even though Section 36(h) of the National Bank Act is not an adoption of state law like Section 36(c), it is part of a federal statute that reflects a pervasive policy of coordination. It would be unsound to assert that the proper interpretation of Section 36(h) is independent of state policy and legislation."

this policy has been abandoned, and the Comptroller has ruled that his determination of whether such a facility desired by a national bank is or is not a "branch" can be made without regard to state branch law even if it resulted in instances where a national bank was permitted a facility barred to a state bank under state law as an unlawful branch. *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, 291 F.Supp. 180 (D. Wash. 1966), upon which the court below so heavily relied (A. 401-406), held that ruling of the Comptroller to be in error.[15]

Second, as seen from note 5, *supra*, a number of states prohibiting branches nevertheless permit "tellers' windows", or offices with the limited power of receiving deposits and cashing checks. Prior to Comptroller Saxon's administration, national bank branches in such states were authorized to operate only with those limited powers accorded state banks under state law.[16] Mr. Saxon, however, took the position that if a state bank authorizes any of the named banking functions in Section 36(f), such as cashing checks or receiving deposits, he had the authority to approve national bank branches with the

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[15] In *Mid-West Nat'l Bank of Lake Forest* v. *Comptroller*, 296 F.Supp. 1223, 1226 (D. Ill. 1968) the court pointed out that the Comptroller defended his approval of an adjacent facility for a national bank in Illinois on the grounds that it was *in compliance with Illinois law*, citing *Walker Bank*. This *may* be an indication that the Comptroller's office has reversed the position of Mr. Saxon relating to Section 36(f) and has accepted the position of *State Chartered Banks, supra*. But see: *Jackson* v. *First Nat'l Bank of Valdosta*, 246 F.Supp. 134 (M.D. Ga. 1965), a pre-*Walker Bank* case.

[16] *Hearings before the House Committee on Banking and Currency on Conflict of Federal and State Bankings Laws*, 88th Cong., 1st Sess., 124 (1963). The validity of this position seems particularly strong in the light of the fact that the sole reason why Section 36(f) was included in the McFadden Act of 1927 was to assure that "tellers' windows" would be "branches" subject to state law under Section 36(c) of the Act. (pp. 29-31, *infra*)

power to conduct *any* banking transactions performed by the head office of the bank.[17]

Third, and coming to the factual situation involved in this case, the Comptroller issued Ruling 7490 in 1964 permitting a national bank to provide messenger service by means of an armored car under an agency agreement.[18] Similarly, in 1966 he permitted off-premise loan production offices and off-premise deposit machines.[19] The validity of these rulings is geared to the contention now before this Court, that Section 36(f) is immunized from state law and, therefore, the Comptroller may authorize off-premise banking activities which he contends do not meet the provisions of Section 36(f), regardless of whether under state branch statutes a state bank would be prohibited from performing a similar service.

In the light of the foregoing, it is evident why the Supervisors have a keen interest in this case. The essential question herein is the ultimate choice of law for determining the question of when an additional banking office is a "branch" subject to the restrictions of Section 36(c). If the answer to that question is exclusively a matter of federal law, to be decided without regard to state branch statutes by which state banks are bound, the Supervisors fear a serious imbalance in the dual banking system, or in the competitive equality underlying Section 36(c) of the National Bank Act, based upon *state* law. Both alternatives are real. If national banks are permitted off-premise banking activities not permitted state banks, on the grounds that such activities do not constitute branching subject to the provisions of Section 36(c) of the Act, state banks will be placed at such a competitive disadvantage that they will be forced to convert to national banks and the dual banking system will be weak-

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[17] *Id.* at 348-351, 347, 342-343.

[18] COMPTROLLER'S MANUAL FOR NAT'L BANKS, ¶ 7490, (A. 381).

[19] *Id.* at ¶ 7380, 7491.

ened. Alternatively, state legislature will be forced to act quickly to amend their statutes to permit each type of off-premise activity declared lawful for national banks by the Comptroller. State branching policy based upon local conditions, which underlay Congressional intent to establish state law as the standard for branching under Section 36(c) of the National Bank Act, would be completely subverted.

It is the position of the Supervisors that Section 36(f) of the National Bank Act does not purport to be an *all-inclusive* definition of a "branch". Section 36(f) merely *includes* types of off-premise activities of a bank which may be considered a branch. Indeed, as noted at pp. 29-31, *infra*, the legislative history of Section 36(f) demonstrates that it was included in the McFadden Act of 1927 for the purpose of assuring that at least so-called "tellers' windows", then a current effort of the Comptroller to evade restrictions of national bank branching, would be considered an off-premise activity to be permitted only to the extent permitted state banks by state law. The determination of whether *other* types of off-premise activities may amount to a "branch" not permitted state banks under state law, and, therefore, not permitted national banks, is governed by state branching policy as reflected in state statutes relating to branching. In this way, and in this way only, can Congressional intent to achieve competitive equality between national and state banks in the matter of branching, based on state law, be maintained.

The position taken by the Supervisors places state branch statutes in a position of dominance in the matter of branching, and creates a diversity of permissible off-premise banking activities for both state and national banks throughout the country, dependent upon varying branching policies reflected in the statute law of the individual states. This brief will demonstrate that this is *precisely* what Congress intended. At the outset, how-

ever, the Supervisors would like to put to rest forthwith the concern underlying the entire brief of the *amici* banks, and a large portion of the Comptroller's brief (pp. 31-41), to the effect that the construction of Section 36 of the Act for which the Supervisors contend somehow places national banks in the position of being subject to "unfriendly" rulings of Supervisors or state Attorneys General, or "unfriendly" statutory enactment of state legislatures, resulting in national banks being barred from conducting a wide variety of useful activities, and further creating an unacceptable variation of permissible off-premise activities for national banks in different states.

The source of state law governing the determination of when an off-premise banking activity is a branch is not Supervisor discretion, but the *statute* of a state reflecting its branching policy. As each instance of off-premise banking activity develops, the question arises as to whether it is in accord with, or contrary to, that *statute.* Since state statutes do not cover all eventualities, it is necessary to construe the statute as applied to particular factual situations. In the absence of applicable judicial decisions, Supervisors, usually pursuant to rulings of the state attorneys general, have been called upon to construe state statutes relating to branching.

Virtually the only types of rulings restricting off-premise activities cited by the Comptroller and the *amici* banks relate to deposit and check cashing activities (armored car messenger services, shopping center receptacles for deposits, deposit machines) and loan activities (through loan production offices)—all relating to the banking business "unless", to use the words of the court below, "we were to cast away all concepts of the functional 'business' of a bank." (A. 409) Each ruling has reflected the construction of the state branch statute to determine whether the challenged off-premise activity is, or is not, within the scope of state branching policy as

reflected in the statute. Each ruling is non-discriminatory—equally applicable to *both* state and national banks. Each ruling is subject to judicial review for its correctness. Indeed, the ruling of the Supervisor in this case (Comptroller of Florida) is presently under judicial review, and the court below directed that the ultimate disposition of this case await that judicial determination. (A. 408-409)[20]

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[20] The absence of judicial constructions of state branching statutes relating to these off-premise activities is to be expected because of their relatively recent development. Thus, as the Chairman of the Federal Reserve Board recently testified, ". . . the establishment of loan production offices by banks is a relatively new development . . . ." *Hearings before the House Committee on Banking and Currency on Federal Reserve Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries*, 90th Cong., 2d Sess. 32 (1968). So are teller machines, as indicated by the recent date of the rulings cited by the Comptroller. (Brief, n. 38, p. 39) Nor is the armored car service of the type here in question yet a widespread activity. The Comptroller only cited 13 states where it has had any use whatever (A. 184) including Florida, where it was found unlawful by the case below, and Georgia, where it was found unlawful in *Jackson* v. *First Nat'l Bank of Cornelia*, 292 F.Supp. 156 (N.D. Ga. 1968) Few states have statutory provisions specifically covering the subject: the OHIO REV. CODE ANN. 1101.01(D)(3) specifically excludes from the definition of a "branch" locations where items are received "by armored car service", and in 1968 Virginia permitted banks to utilize armored vehicles for the receipt of customers' deposits in areas where the bank could establish a *de novo branch* (VA. STAT. Chap. 727.) There are also rulings of State Attorneys General or Supervisors covering this type of service, most of which are of relatively recent origin. In addition to the rulings in Florida and Georgia prohibiting this type of service, *supra*, similar rulings have been made in Kentucky (Letter from Deputy Commissioner to First Nat'l Bank of Louisville, October 15, 1968); Montana (Ruling of Supervisor based on Opinion of Attorney General, November 22, 1961); South Carolina (Ruling of Board of Bank Control, August 11, 1965); and Connecticut (Letter from Deputy Attorney General to Bank Commissioner, February 23, 1951). On the other hand, this service has been permitted substantially along the lines of that permitted by the Comptroller in California (State Banking Department's Weekly Bulletin, April 9, 1965); Colorado (Banking Board Regulation 3-1.1); and Pennsylvania (Notice from Secretary of Banking, to all State Banks, September 23, 1964).

Petitioners have hypothecated that under the decision below, state legislatures would be able to pass legislation unfriendly to national banks, or Supervisors would be able to issue unfriendly rulings, barring a wide range of additional activities, on the grounds that they constitute unlawful branching. Just why state legislatures or Supervisors would embark on a program to prohibit *state* banks from conducting useful activities in order to be unfriendly to *national* banks is never explained, and is an argument patently without merit. Further, state branch statutes are not open-ended; unreasonable constructions of those statutes can be struck down in the same manner that constructions of any other statutory provision may be challenged. What must really be meant by the word "unfriendly", therefore, is simply a disagreement by the Comptroller and some national banks with some state policies protecting the unit banking or limited branching systems. But that, the Supervisors contend, is a matter which the Congress has left to the states to decide.

Petitioners also express frustration with the fact that the rulings on such matters as armored car messenger services, shopping center receptacles, teller machines and loan production offices are different in different states. Of course they are. Each reflects state statutes relating to branching which in and of themselves vary widely. Thus it is to be expected that restrictive rulings have emanated from such states as Florida relating to these activities because the Florida statute bars any off-premise activities with the single exception of permitting a bank to pick up deposits for school savings plans at the schools. FLA. STAT. 659.06. Indeed, all of the rulings restricting loan production offices or teller machines cited by the Comptroller (Brief, fn. 38, p. 39) and *amici* banks (pp. 5, 11-14) come from states which *prohibit* branching,[21] or restrict it,[22] with but one exception (North Caro-

[21] Illinois, Oklahoma, Texas and Florida. Note 5, *supra*.

[22] Kentucky, Georgia and Wisconsin (which only moved from a non-branching state in 1967 to permit a very limited branching in

lina—a statewide branching state) whose ruling the *amici* banks have misconstrued both as to federal and state law.[23]

The point is, as will now be demonstrated, that Petitioners' frustration with variant rulings relating to off-premise activities, is directed to the wrong forum. Congress *intended* this variation between states in the matter of branching in order to reflect differing local conditions and differing branching policies in each state. If the *amici* national banks are dissatisfied with branching policy in their states, they can seek amendatory state branch legislation, as national banks have sought to do in a number of states.[24]

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municipalities which have no banks or branch banks and where there are no banks or branch banks located within three miles of the proposed site of the branch). *Supra* note 6 and WISC. STAT., ch. 253 (1967).

[23] The ruling cited by the *amici* banks from the Attorney General of North Carolina to the Commissioner of Banks, Dec. 23, 1968, disapproving loan production offices is said to be in violation of the approval of such offices by the Federal Reserve Board "only four months prior to his ruling. 33 F.R. 11812 (Aug. 14, 1968)." (Brief, p. 5) This is incorrect. The Federal Reserve Board ruling simply removed any bar in *federal* statutes to such an office but, as the Chairman of the Federal Reserve Board testified the following month in explanation: "If the law of the state where the bank is chartered, as interpreted by State authorities, prohibits the bank from conducting its operations in this fashion, that will end the matter." *Hearings before the Committee on Banking and Currency, on Federal Reserve Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries*, 90th Cong., 2d Sess. 31 (1968). Secondly, the specific holding of the opinion of the North Carolina Attorney General was not as broad as *amici* banks would imply. It simply held that where an automobile dealer, pursuant to an arrangement with a bank, is authorized by a bank to complete a note and security instrument for a purchaser, and the purchaser is thereby authorized to draw a draft on the bank for the amount of the loan, *all in the automobile dealer's office*, that place constitutes a loan production office. That is *all* the opinion held and the extenuated hypothecations of the result of that opinion with regard to other off-premise activities drawn by the *amici* banks at great length in their brief are just that.

[24] See 32 U. CHI. L. REV. 148, (1964), with references to current news reports.

ARGUMENT

I. Congress Affirmatively Adopted A "Policy Of Equalization" In The National Bank Act When It Designated State Law As The Standard For Banking Operations Of National Banks In Many Basic Competitive Areas.

No one challenges the fact that Congress could have barred the applicability of state law to all operations of national banks. However, it did not do so. It adopted a "policy of equalization" whereby state law is applicable to national banks in many of the basic competitive areas of banking. The development of this "policy of equalization", which plays a critical decisional role in this case, requires a brief survey of the history of the banking system of the United States.[25] That history can be roughly divided into three periods:

The first period lasted until 1863 during which, except for the brief periods of the First (1791-1811) and Second (1816-1832) Banks of the United States holding charters from Congress, there was only a state banking system.

The second period lasted from 1863 to 1913. The birth of a system of national banks in 1863 chartered by the federal government and issuing notes secured only by their holdings of government bonds, was engendered by Secretary of the Treasury Salmon P. Chase in order to provide a market for government bonds, and hence funds required to finance the Civil War. The system was also designed to replace the highly diversified issues of state bank notes which would be encouraged out of existence by a heavy federal tax. Such was the import of the legislation of Congress in 1863,[26], 1864[27] (the National Bank

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[25] See, generally, BANKING STUDIES, *supra* note 2; BANKING & MONETARY STUDIES Carson ed. 1963; PROCHNOW, AMERICAN FINANCIAL INSTITUTIONS (1961).

[26] Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

[27] Act of June 3, 1864, ch. 106, 13 Stat. 665.

Act) and 1865.[28]

State banks declined drastically after this legislation and the survival of the state banking system was largely the result of the growth and profitability of deposit banking.[29] With their recovery, however, the "dual banking system" first emerged as a reality—a system wherein state banks operated under state law, and national banks operated entirely under the National Bank Act, which then had but few references to state law.[30] It was *during this period* of almost complete duality that this Court decided a series of cases, upon which Petitioners rely so heavily in this case, to the effect that the National Bank Act constitutes ". . . by itself a complete system for the establishment and government of national banks . . . ." *E.g.*, *Cook County National Bank* v. *United States*, 107 U.S. 445, 448 (1883). Further, it was during this period (considering the part which national banks played in the currency scheme of the United States) that this Court considered national banks to be "federal instrumentalities", *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664 (1899), in the same manner as Chief Justice Marshall had considered the Second Bank of the United States to be a federal instrumentality in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

The third period commenced with the Federal Reserve Act of 1913,[31] and continued through the great banking legislation of the McFadden Act of 1927 and the Banking Act of 1933. The character of the banking system of the United States was *fundamentally* changed by this legisla-

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[28] Act of Mar. 3, 1865, ch. 78, 13 Stat. 484; see also Act of July 13, 1866, ch. 184, 14 Stat. 146; *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869).

[29] BANKING STUDIES, *supra* note 2, at 15, 418.

[30] See Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108 (rate of interest on loans) and Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111 (national bank shares taxable at rate not to exceed rate on state bank shares).

[31] Act of Dec. 23, 1913; ch. 6, 38 Stat. 251.

tion. First, the adoption of the elaborate system of monetary controls in the Federal Reserve Act of 1913, and the retirement of notes issued by the national banks in 1935, diminished to the point of extinction the role of national banks as "federal instrumentalities" in the fiscal operations of the government.[32] Second, there was a strong effort to strengthen the national banking system by broadening its statutory authority so that it could better compete with state banks.[33] Third, the federal gov-

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[32] A cogent marshalling of facts supporting this conclusion is to be found in the dissenting opinion in *First Agric. Nat'l Bank* v. *State Tax Comm'n.*, 392 U.S. 339 (1968), finding that national banks are no longer federal instrumentalities (an issue which the majority did not find necessary to reach to decide the case.) The Dissent noted that ". . . national banks under Civil War Legislation, to which national banks today trace their history, had important and significant functions concerning currency. . . . All of this was radically changed with the passage of the Federal Reserve Act of 1913, 38 Stat. 251, as amended, 12 U.S.C. 221 et seq., and by subsequent developments with respect to both the Federal Reserve System and to national banks. To capsulize those developments greatly, suffice it to say that the Federal Reserve banks (and System) are now the monetary and fiscal agents of the United States. 12 U.S.C. 391. By 1935, the power of national banks to issue currency had ceased and now Federal Reserve banks are the only banking institutions that can do so." 392 U.S. 343, 356. The Dissent concluded: "Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors." *Id.* at 358.

[33] "The diminished importance of national banks as federal functionaries was compensated for by the enactment of legislation designed to make them more competitive with state banks, *e.g.*, branch banking, 44 Stat. 1228 (1927), as amended, 12 U.S.C. 36(c) fiduciary powers, 76 Stat. 668 (1962), 12 U.S.C. 92(a); rate of interest on loans, 48 Stat. 191 (1933), as amended, 12 U.S.C. 85; capitalization, 48 Stat. 185 (1933), 12 U.S.C. 51; and interest on time and savings deposits, 44 Stat. 1232 (1927), 12 U.S.C. 371." *First Agric. Nat'l Bank* v. *State Tax Comm'n.*, 393 U.S. 343, 356-357 (1968) (Dissent). See, also, H.R. REP. NO. 83, 69th Cong., 1st Sess. 6 (1926) commenting on the McFadden Act: "The enactment of this bill into law will put new life into the national banking system. The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of national banks will be more nearly on a par with those of the State member banks. . . . Many of these State banks are operating under modern banking codes."

ernment, for the first time, entered into the field of the regulation of state banks electing to become members in the Federal Reserve System established in 1913, or later undertaking deposit insurance from the Federal Deposit Insurance Corporation under the enactment of 1933.[34]

Fourthly, and of particular significance to this case, it was during this period between 1913 and 1933 that a "policy of equalization" was finally forged wherein Congress established state law as the standard for national banks in many of the important areas of banking. Thus, it was in 1918 that the Comptroller was authorized to permit national banks, when not in contravention of state or local law, to act as a trustee or in any other fiduciary capacity in which state banks which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located.[35] In 1927 national banks were not permitted to pay interest on time and savings deposits at rates in excess of those permitted by state law for state banks.[36] In 1930 a national bank was permitted to give security for state deposits which made them eligible for deposits which previously were only available to state banks.[37] In 1933

[34] Under the Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified in 31 U.S.C. 409 and in various sections of 12 U.S.C.), and under the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified in scattered sections 12, 15, 39 U.S.C.), the Federal Reserve Board was given a wide variety of supervisory powers over state member banks, and the Federal Deposit Insurance Corporation was given a similar supervisory authority over state non-member insured banks. Congressional authority over state member banks stems from the fact that they voluntarily accepted federal regulation as the "price" for the benefits of membership in the System. See *Westfall* v. *United States*, 274 U.S. 256, 258-9 (1927).

[35] Act of Sept. 26, 1918, ch. 177, 40 Stat. 968, *as amended*, 12 U.S.C. 92a(a) (Supp. 1969)

[36] Act of Feb. 25, 1927, ch. 191, 44 Stat. 1233

[37] Act of June 25, 1930, ch. 604, 46 Stat. 809, *as amended*, 12 U.S.C. 90 (Supp. 1969)

state law was made the measure of capitalization of new banks in certain instances.[38] And, of course, in 1927 and again in 1933 Congress made state law the standard for branches of national banks, as will be developed in detail at pages 22-25, *infra*.

In the case of *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934), this Court had occasion to consider the foregoing pattern of the National Bank Act, in connection with construing the 1930 amendment of the Act referenced above, and concluded that Congress had intended to adopt a "policy of equalization" therein. 292 U.S. 564-5. Similarly, in the *Walker Bank* case, *supra*, decided in 1966, this Court in declaring Congressional intent in Section 36(c) of the Act to place national and state banks on a basis of "competitive equality" under state law insofar as branch banking was concerned, concluded that it was part of the overall "policy of equalization" adopted by Congress in the National Bank Act. 385 U.S. at 261.[39]

In addition to specifically applying state law to national banks in many instances, Congress also effectuated the "policy of equalization" by refraining from occupying the field so as to preclude the application of state laws which do not conflict with federal law to national banks. Thus, in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640

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[38] Act of June 16, 1933, ch. 89, 48 Stat. 185, *as amended*, 12 U.S.C. 92a(i) (Supp. 1969)

[39] In the interim between *Lewis* v. *Fidelity & Trust* and *Walker Bank* there had been additional indications of the "policy of equalization". Thus in 1950 no conversion of a national bank to a state bank, or its merger with a state bank, was permitted "in contravention of the law of the State in which the National Banking Association is located." Act of Aug. 17, 1950, ch. 729, 64 Stat. 456, 12 U.S.C. 214c (1964). Also, in the Bank Holding Company Act of 1956, there was a reservation of power to the states over bank holding companies, and bank subsidiaries, Act of May 9, 1956, ch. 511, 70 Stat. 133, 12 U.S.C. 1846 (1964). This latter provision negates the suggestion of the *amici* banks (Brief, p. 16) that the decision of the court below would somehow give states more power than they presently have with regard to bank holding companies.

(1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co., supra*, this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 292 U.S. 559, 565-6. See, also, *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938), *McClellan* v. *Chipman*, 164 U.S. 347 (1896), all of which, along with *Lewis* v. *Fidelity & Deposit Co., supra*, were cited by this Court in the *Walker Bank* case in support of its statement that a "policy of equalization" underlies the National Bank Act. 385 U.S. 261.

Congress has thus given a special significance to the applicability of state law to the national banks which it has created. It has *intended* that state law be applicable to national banks in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive. As Representative McFadden, the sponsor of the McFadden Act of 1927 said:

> "The business of banking is a competitive commercial enterprise like any other business which makes a profit through the rendition of service to the public. Under our financial system where in each State of the Union there are two systems of banking—National and State—each in natural competition with the other for business, it is necessary for their mutual existence that their charter powers be substantially equal." . . . 65 CONG. REC. 11296 (1924)

Thus "the goal of equality" in the more important areas of banking based upon *state* law applicable to *both* state and national banks, which the court below sought to serve is not, as [redacted] the Comptroller urges, "chimerical". (Brief, p. 10) It is a *fact* of Congressional *intent*.

II. Nowhere Has The "Policy Of Equalization" Been More Forcefully Demonstrated Than In The Competitive Equality Established In The Branching Provisions Of The National Bank Act.

As noted below (A. 397-399), this Court had occasion in the *Walker Bank* case to consider exhaustively the legislative history of Section 36(c)(1) of the National Bank Act, first enacted in the McFadden Act of 1927, and Section 36(c)(2) of the Act, first enacted in the Banking Act of 1933. The conclusion drawn, stated at 385 U.S. 261, was that:

> ". . . Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned."

It was primarily on the basis of this holding of Congressional intent that the court below correctly concluded that Congress did not intend the delineation of a "branch" to be solely a matter of federal law, thus permitting the Comptroller to determine unilaterally that an off-premise office of a bank is not a "branch" and, therefore, immune from any restriction in state branching law under Section 36(c).

The Comptroller recognizes the foregoing as the central issue of this case. However, he denigrates "competitive equality" as a "catchy" phrase or "slogan" (Brief, p. 15), meaning nothing more than an effort of Congress in the McFadden Act of 1927 to bring national banks up to the level of branching authority held by state banks (Brief, pp. 15-23). He rejects a reading of the legislative history as reflecting a determined Congressional intent to equalize the branching powers of state and national banks on the basis of state law.

The Comptroller errs. Whereas he is correct that the principal motivation for the branching provisions of the McFadden Act of 1927 was to repair a competitive disadvantage held by national banks unable to compete with

state banks holding branching authority under state law, this is by no means the whole story. The legislative history of Section 36(c), both in the McFadden Act of 1927 and the Banking Act of 1933, makes it equally clear that Congress intended to establish state law as the standard for branching of *both* national banks and state banks and, thereby, to establish competitive equality between the two *based on state law.* This fact can be demonstrated by reference to just two essential portions of that legislative history—the rejection of the Hull amendments in the 1927 bill and the rejection of the Glass proposal in the 1933 bill.

As this Court said in the *Walker Bank* case in its discussion of the history of the McFadden Act of 1927:

> "The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching." 385 U.S. 258.

This was a reference to the so-called "Hull amendments" to the House bill (H. R. 2) which had proposed that national banks and state member banks might only establish intra-city branches in states permitting such branches at the time of the enactment of the bill.[40] No right was given to such banks if, at a later time, state law permitted state banks to establish such branches. The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on state legislatures to decline to expand branch authority and that the matter of branching privileges was a matter for the states to decide. It said:

> "The real purpose of the Hull amendments, as shown by the testimony given before your commit-

[40] H. R. REP. No. 83, 69th Cong., 1st Sess. 4-5 (1926).

> tee, is to bring pressure to bear upon the leading bankers in States which now prohibit branch banking by depriving them of the motive to seek a change in the State laws favorable to branch banking. It is to coerce them to remain silent. Your committee feels that this is an unprecedented policy for the Federal Goernment to pursue and constitutes an unwarranted interference with the rights of citizens of these States in their relationship to the State legislatures." [41]

Congressional intent to establish state law as the standard for competitive equality between state and national banks in the matter of branching is also illustrated by the rejection of the Glass proposal in the Banking Act of 1933. As noted by this Court in the *Walker Bank* case, 385 U.S. 259, the initial legislation submitted by Senator Carter Glass, ultimately the sponsor of the Banking Act of 1933, proposed that national banks should be able to organize branches *irrespective of state law*, knowing full well, as the Senator said, that:

> ". . . if Congress enacts this bill into law, there is not a state in the Union that will not promptly authorize its State banks to get on an equality of competition with the national banks by adopting the state-wide branch banking system." 75 CONG. REC. 9892 (1932).

As this Court noted, this proposal ". . . was strenuously opposed and was eventually defeated." 385 U.S. 259. The bill was finally passed after an amendment was adopted on the floor of the House (known as the Bratton amendment and itself amended by amendments of Senators Wheeler, Copeland and Blaine),[42] which restored state law as the standard for branches of national banks. In this connection Senator Bratton said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking

[41] S. REP. No. 473, 69th Cong., 1st Sess. 9 (1926).

[42] 76 CONG. REC. 1997, 2080, 2079, 2205 (1933).

> shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 CONG. REC. 1449 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said:

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." 76 CONG. REC. 1997 (1933).

The Bratton amendment, as amended, passed the Senate on January 21, 1933, 76 CONG. REC. 2208. The bill was not enacted, however, until the following session at which time the language of the branch provision had been modified somewhat by the Conference Committee. H.R. REP. No. 254, 73d Cong., 1st Sess. 29 (1933).

Thus, if there is one clear-cut, unequivocal, point to emerge from the legislative history of Section 36(c) of the Act, it is, as this Court found in *Walker Bank*, a Congressional intent to place national and state banks on a basis of "competitive equality" insofar as branch banking is concerned. That competitive equality was not, as the Comptroller urges, simply a desire to give national banks the right to branch held by state banks. It was the establishment of a standard of branching for *both* classes of banks *based upon state law.*

III. Petitioners' Efforts To Immunize The Comptroller From State Law In The Determination Of A "Branch" Is Destructive Of Congressional Intent In Section 36 Of The National Bank Act To Establish Competitive Equality In The Matter Of Branching Based On State Law, And Is Not Supported Either By The Language Or The Legislative History Of Section 36(f) Of The Act, Or By Any Alleged Necessity To Protect The National Banking System.

In the light of the policy emerging from the legislative history of the branching provisions of the 1927 and 1933 legislation set forth above, the Supervisors submit that the principal tool of statutory construction applicable in this case must be the implementation of the broad national policy of this legislation. *National Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612 (1967); *Lawson* v. *Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); SUTHERLAND, STATUTORY CONSTRUCTION, ¶ 4501 at 315 (1943): (". . . the application of the law according to the spirit of the legislative body remains the principal objective of judicial interpretation.") The construction sought by Petitioners which permits the Comptroller to define off-premise offices as non-branches immunized from state law would completely contradict "competitive equality" based on deference to state branch law which Congress intended in the branching provisions of the National Bank Act. *Walker Bank, supra.* Thus a national bank can not be authorized to conduct an off-premise activity held to be an unlawful branch under state law, even though the Comptroller may conclude that it does not fall into one of the activities delineated in Section 36(f).[43]

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[43] The principle of "competitive equality" for which the Supervisors contend, prohibiting a national bank off-premise activity declared not to be a branch under Section 36(f), but declared to be an unlawful branch under state law, would, in reverse circumstances, permit a national bank off-premise activity declared to be a branch under Section 36(f), but not to be a branch under state law. The requirement that a national bank may only be permitted a branch "expressly authorized" to a state bank was not included in the

Petitioners err in their reliance upon Section 36(f) in arguing that the Comptroller is completely immunized from state law in determining when an off-premise activity is a branch for the purposes of Section 36(c).

Section 36(f), on its face, is not an *all-inclusive* definition of a "branch". It does not say that "a 'branch' *means* . . . ." It says "the term 'branch' . . . shall be held to *include* . . . ." (Emphasis supplied)[44] In *Halver-*

McFadden Act of 1927 (Comptroller's Brief, p. 51), but was added by the Banking Act of 1933 in Conference Committee, along with the "affirmatively and not merely by implication or recognition" language now in Section 36(c)(2). H.R. REP. No. 254, 73d Cong., 1st Sess. 29 (1933). The origin of that language was Senator Wheeler who wanted the words "expressly authorized" included to tie down the prohibition of branch banking in a state, such as Montana, which then had no branch statute. 76 CONG. REC. 1997 (1933). The Supervisors believe that it is consistent with this legislative history demonstrating a Congressional intent to avoid any situation by which a national bank could secure branches contrary to state law, to conclude that a construction of state law to permit an off-premise facility as a non-branch controls, so as to permit *any* state member or national bank to operate such an office even though it might be held to be a "branch" under the definition of Section 36(f).

[44] Section 36(f) of the National Bank Act and § 7-3-6 of the Utah Code (cited by the Petitioners) is to be contrasted with the all inclusive branch definitions which appear in varying state statutes. A sampling of these statutes follows: GA. CODE ANN. § *13-201.1(b)*. "The term 'branch bank' as used in this title *means* any additional place of business of any parent bank not located in the particular city, town, or village where its parent bank was chartered. *N. H. Rev. Stat. Ann. 384-B:1, III.* "Branch office *means* any house, office, separate building depot, agency, mobile facility or place of business, other than its principal office, at which deposits are received, checks paid, or loans made or payments thereon received, or any of a bank's other usual banking business is conducted, but shall not include any place at which records are made, posted, or kept." OHIO REV. CODE ANN. § *1101.01(D)*. "Branch *means* any office or other place at which a bank receives money or its equivalent from the public for deposit and conducts a general banking business, but does not include a bank's principle place of business." WASH. REV. CODE § *30.04.010*. " *'Branch bank'* means any office or deposit or discount maintained by any bank or trust company, domestic or otherwise, other than its principal place of business, regardless of whether it be in the same city or locality."

ing v. *Morgan's Inc.*, 293 U.S. 121 (1934), this Court indicated that "means" and "includes" can have a different meaning, and that "the natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Id.* at 125, n. 1.[45]

Thus to the extent that an off-premise activity of a bank is found to be included in the delineated activities in Section 36(f), it is a "branch". But since the provision is not all-inclusive, there is clearly room for other off-premise activities of a bank as "branches". And the determination of whether *other* off-premise acitivites of a bank are "branches", prohibited to national banks because they are prohibited to state banks under state law, is to be determined by state branching policy as reflected in state statutes relating to branching. Otherwise, the competitive equality intended in the matter of branching underlying Section 36(c) is subverted. The court below correctly so held:

> "Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36(f) Congress provided only that the term 'branch' 'shall be held to include' these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the lifeblood of banking. If we construed Section 36(f) as permitting paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths." (A. 406-407)

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[45] See, also, *Fed. Land Bank* v. *Bismark Lumber Co.*, 314 U.S. 95, 99-100 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941).

The legislative history of Section 36(f) supports this conclusion. It demonstrates a Congressional intent to make sure that included in the term "branch" would be one type of off-premise activity—tellers' windows—which the Comptroller of that era had permitted and which was generally thought to be an unlawful branch activity. The chronology runs as follows:

In 1923 the Attorney General of the United States advised the Comptroller that he could authorize national banks to establish a separate office where only "routine services" were performed, such as the receipt of deposits and cashing checks, on the grounds that such an office was not a "branch". The ruling was made applicable to intra-city additional offices but not to such offices outside of the city designated in the national bank's organizational certificates. (34 OP. ATT'Y GEN. 1) This ruling, sought by Comptroller Dawes, thus validated so-called tellers' windows for national banks which had been authorized by his predecessor, Comptroller Crissinger, the preceding year.

On January 28, 1924, this Court issued its decision in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), holding that a national bank had no power to establish a branch in contravention of state law. Then, as was later explained during the debates on the McFadden bill:

> "Subsequent to this decision the United States Government requested a rehearing on the point that this decision left uncertain the legality of the establishment of 'additional offices' in the cities in which the parent bank is located, which was authorized by Comptroller Crissinger in 1922. The Supreme Court, however, refused the requested rehearing; but, nevertheless, the comptroller has continued to sanction the establishment of 'additional offices' in the home city

> of a parent national bank in States where State banks are allowed to maintain branches." [46]

On February 11, 1924, Mr. McFadden introduced H.R. 6855 (68th Cong., 1st Sess.), which contained a provision that a branch "shall be held to embrace any additional office maintained by an association at which deposits are secured or checks cashed outside of the parent bank." On April 15, 1924, during the hearings on this bill, a confidential reprint of that bill was introduced [47] which contained language which, with slight modifications, became the provision eventually enacted as Section 36(f).[48]

On June 7, 1924, Mr. McFadden stated during the debates:

> "Under a ruling issued by ex-Comptroller of the Currency Crissenger, and supported by an opinion from the then Attorney General, national banks in cities where State banks were engaged in branch banking were permitted to establish what has been called 'additional offices' or 'tellers' windows' for the receipt of deposits and cashing checks. . . . A limited number of these additional offices have been established, but their status is not legally certain in view of the implications in the decision of the Supreme Court in the St. Louis case, and they are otherwise not adequate to meet the situation. . . . This bill will clear up the uncertainties which may be

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[46] Report of Mr. Witte (Chief, Wisconsin Legislative Reference Library, attached as an appendix to a speech of Mr. Nelson of Wisconsin. 66 CONG. REC. 1578 (1925) See, also, FISCHER, *supra* note 2 at 44-47.

[47] *Hearings on H. R. 6855 before the House Committee on Banking and Currency*, 68th Cong., 1st Sess. 53 (1924).

[48] The provision included the words "or branches" and did not include the phrase "located in any State or Territory of the United States or in the District of Columbia". *Id.* at 3. The latter phrase was included in the provision contained in H. R. 8887, introduced April 25, 1924. No explanation was given for the change in language from H. R. 6855.

involved in this situation." 65 CONG. REC. 11298 (1924)

The same point was made in later debates. Thus Mr. Stevenson, a member of the House Committee on Banking and Currency, after discussing the Comptroller's ruling and the *Missouri* case, cited the provision (now Section 36(f), and said: ". . . you take away from the comptroller the right to say that banks can maintain offices at which they can pay checks and receive deposits." 66 CONG. REC. 1628 (1925).

Substantially all references to Section 36(f) in the debates which took place in 1925 and 1926 are in relation to the *Missouri* decision and tellers' windows. 66 CONG. REC. 1627-28, 4410, 4432-33 (1925); 67 CONG. REC. 1777, 2840-41, 2860, 3232, 3238, 8396 (1926).

Thus, Petitioners err in jumping from a statutory provision which states that a branch "*includes*" (emphasis supplied) the type of activity performed by a tellers' window, representing the most immediate threat to the integrity of branching provisions Congress was considering in the McFadden Act, to the ultimate conclusion that Section 36(f) was intended by Congress as an *all-inclusive* definition of a branch, completely immunized from any reference to state law. There is simply nothing in the words of Section 36(f) or in the legislative history of Section 36(f) to suggest such a conclusion.

The foregoing recitation of legislative history also answers Petitioners' reliance upon a 1911 opinion of the Attorney General, 29 OP. ATT'Y GEN. 81 (1911). They argue that this opinion, approved by this Court in 1924 in the *Missouri* case, *supra*, at 658, fn. 1, meant that anything less than an off-premise office conducting a full banking business was not a forbidden "branch", and that Congress intended to carry that concept over into the McFadden Act of 1927. The Petitioners err. A "teller's window" is a limited power branch *not* conducting a full

banking business, and the legislative history of the McFadden Act makes it eminently clear that Congress intended that the issue of whether such a facility could be conducted by a national bank was to be decided by reference to *state* statutes relating to branching.

The Comptroller also points to off-premise messenger services performed by national banks with armored cars before the McFadden Act, citing certain articles in the *Bankers' Magazine* for the period 1906 through 1912. But whatever may have been the validity of the referenced armored car messenger services in 1912, even the Comptroller would now agree that they would be unlawful. These services clearly fall under the ruling of the Deputy Comptroller of the Currency in 1962 ". . . that the practice of furnishing mobile pick-up service of the deposits of customers is a type of branch banking which the statutes do not permit." (A. 359)

A final comment should be made with regard to the argument of the Comptroller and the *amici* banks that failure to immunize branch definition from state law would seriously jeopardize the existence of the national banking system. The theory advanced is that "imaginative and vigorous national banks" (Comptroller's Brief, pp. 33-34) are developing modern concepts of banking which, under the ruling of the court below, "would subject national banks to unfriendly state legislation" (*Id.* at 36) construed by "state banking departments . . . controlled by persons from or associated with state banks" (*Id.* at 38), and would result in an "extraordinary disparity of treatment of national banks by the various states" (*Amici* Brief, p. 5).

This line of argument errs on all counts.

First, there is "extraordinary disparity of treatment of national banks by the various states" in the matter of branching today. This result was *specifically* intended by Congress when it rejected the proposal of Senator Glass

back in 1933 to permit the establishment of branches of national banks regardless of state law and to make state branch law the standard for branches of national banks. pp. 24-25, *supra.*

Second, with regard to the Comptroller's hypothecation of "unfriendly" state legislation, the idea that a state would pass branching legislation designed to hurt national banks when that legislation would be equally applicable to state banks, is simply preposterous. When the Comptroller refers to the possibility of "unfriendly" legislation he must simply mean legislation with which he might disagree. But Congress established *state* branch law as the standard for branches of national banks in 1927 and 1933, as part of the final forging in the 1913-1933 period of a "policy of equalization" involving the establishment of state law as the standard for national banks in *many* areas. (pp. 16-21, supra.) It is, therefore, no help for the Comptroller to quote the reference by this Court to "the hazard of unfriendly legislation by the States" in *Tiffany* v. *National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (Brief, p. 35). *Tiffany* was decided in *1874*, shortly after Congress had passed a bank note tax designed to put state banks out of business! The Court there noted that "national banks have been national favorites"; "much has been done to insure their taking the place of state banks"; and state banks "have been substantially taxed out of business." 85 U.S. 409, p. 413. Surely too much water has flowed under the dam in the past 95 years, including the final development of the "policy of equalization" in the 1913-1933 era wherein Congress subjected national banks to state legislation in many areas, for *Tiffany* to affect the current situation.

Third, the concept that the decision below somehow places national banks at the mercy of the Supervisors is totally unwarranted. As noted at p. 12, *supra*, the source of state law is not Supervisor imagination, but the *statutes* of a state reflecting its branching policy. The only

guide to the construction of the Florida branch statutes involved in this case which the court below had before it was a ruling by the state supervisor. The court adopted that ruling after agreeing that it appeared in accord with the Florida statute limiting banking activities to one place of business. (A. 408-409) Recognizing that a more authoritative construction would emerge from pending litigation in a state court, however, it directed that the district court retain jurisdiction and "if Florida law is ultimately determined to be different than here expounded", the court was then to review the decision. (A. 409)

Fourth, the argument of the Comptroller that somehow the result of the decision below is tantamount to Supervisor approval of the Comptroller's decisions regarding branch banking is without merit. (Brief, pp. 39-41) Of course the Comptroller does not have to seek Supervisor approval of his decisions. But since *Congress* has provided that the establishment of branches of national banks is to be determined by *state* law, surely Congress did not intend an iron curtain to descend between the Comptroller's office and the Supervisors. In the words of the Sixth Circuit, "all of the foregoing would seem to demonstrate the wisdom of cooperation between the state and federal banking authorities in matters affecting the approval, and the establishment of state and national banks", and "such cooperation appears to have been intended by Congress . . . ." *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 543 (6th Cir. 1958), *cert. denied*, 358 U.S. 830 (1958). *Consultation* as to the meaning of state law is *not* tantamount to Supervisor approval of decisions of the Comptroller.

Finally, Petitioners have compiled a fearsome list of activities which, they assert, state supervisors can strike down under the decision of the court below under the guise that they are "branches" forbidden under state law. The list compiled by the Comptroller, for example, includes such matters as new-business solicitation, sale of

money orders and travellers checks, banking by mail, credit card services, various correspondent services, etc. (p. 34) The listing of the *amici* banks is even longer. (pp. 6-7)[49]

The facts are that substantially the only type of rulings relating to off-premise activities of a bank cited by the Petitioners have involved armored car messenger services, shopping center receptacles, deposit machines and loan production offices. (p. 12, *supra*) States which held these activities to be unlawful branching have found that the production of loans and the picking up of checks and the making of deposits away from the banking house comprise banking business contrary to the unit banking concept embedded in their statutes prohibiting branch banking. Indeed, these states can legitimately ask the question "who needs a branch?" if loans can be produced at loan production offices and check cashing and deposits can be handled through various mobile and mechanized means. Thus, what may be "imaginative and modern expansion" to some may spell a breakdown in unit banking and resulting economic concentration to others. There are arguments on both sides of this issue. Congress has selected *state* legislatures as the forum in which that issue is to be resolved. In Florida a bank may not avoid the prohibition against branch banking by purporting to act as the "agent" of its customers for the purpose of engaging in banking transactions with itself.

To go further and suggest, as the Petitioners do, that unless the definition of branching is completely immunized from state law, state legislatures or Supervisors may embark on a program to prohibit their *own* banks from such activities as banking by mail or credit cards (a universal practice throughout the country of both state

[49] Some of these hypothecations are irrelevant to the discussion. The issue here is the off-premise activity of a *bank*, which would clearly not cover services by an independent contractor such as Brinks. (Brief, p. 6)

and national banks) in order to somehow hurt national banks, is a thoroughly unreasonable hypothecation. Further, state branch statutes are not, in and of themselves, open-ended. Unreasonable construction of those statutes can be struck down in the same manner as constructions of any other statutory provision may be challenged.

Thus the dire predictions advanced by the Petitioners resulting from an affirmation of the judgment of the court below are not real. Contrawise, the predictions advanced by the Supervisors resulting from a reversal are real. The dual banking system simply could not survive a situation wherein national banks were permitted substantial off-premise activities not permitted to state banks under state law. State legislatures would be forced to amend their statutes each time the Comptroller rules that new off-premise activities are non-branches under Section 36(f), and the standard of state law established by Congress to achieve competitive equality between national and state banks in the matter of branching would be substantially eroded. Implementation of Congressional intent can only be achieved by holding, as the Supervisors urge, that the determination of a "branch", for the purposes of Section 36(c) of the National Bank Act, is not exclusively a matter of federal law under Section 36(f) of that Act, but includes off-premise activities of national banks declared to be an unlawful branch for state banks under state branch statutes.[50]

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[50] The recent ruling of the Federal Reserve Board, 33 F.R. 11812 (Aug. 14, 1968), is in accord with the position taken by the Supervisors. There, as explained by Chairman Martin, the Board ruled that a loan production is not a "branch" under Section 36(f), but that the operations of such an office may be prohibited by states holding such an office to be an unlawful branch under state law. See *Hearings before the House Committee on Banking and Currency, on Federal Reserve Board Rulings Regarding Loan Production Offices and Purchases of Operating Subsidiaries*, 90th Cong., 2d Sess. 31 (1968).

CONCLUSION

For the reasons set forth above, the National Association of Supervisors of State Banks seeks affirmation of the judgment of the court below, and an affirmative answer to the question presented to this Court by this case, as set forth at page 1, *supra*.

Respectfully submitted,

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July 1, 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 777

No. 932

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida,

and

WILLIAM B. CAMP, Comptroller of the Currency, *Petitioners,*

vs.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENTS
Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank, Peoples Bank of Lakeland

I.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED

The sections entitled Opinions Below, Jurisdiction, and Statutes Involved contained in Petitioner Comptroller of the Currency's brief on the merits are incorporated by reference herein.

II.

QUESTION PRESENTED

Whether the off-premises armored car and shopping center depository operations of plaintiff National Bank are performed in contravention of federal and state branching law.

III.

STATEMENT[1]

In September, 1966, petitioner, The First National Bank in Plant City, ("plaintiff national bank" or "First National") began providing daily bank armored car operations in Plant City, Florida, and the surrounding trade area in Hillsborough and Polk counties (A. 63).

The armored car, described by First National as a "mobile drive-in," has a glass window and a counter on one side where customers may be served (A. 87-88, 384-85, 389; see State Banks Ex. 1, A. 117, 119 for picture). It is staffed by a driver-guard and a teller, both of whom are full-time employees of First National (A. 50, 57, 384, 389). Change is delivered and funds for deposit are received by First National at the depositors' premises via the armored car.

The armored car is owned and completely controlled by First National (A. 135-36). Plaintiff national bank bears the entire cost of its armored car operation (A. 102).

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1. The letter "A." designates references to the printed Appendix; the letter "R." identifies matters in the original record-on-appeal that are not contained in the Appendix. References to the brief on the merits of the Comptroller of the Currency are designated "C.B.," and, those to First National's brief, "B.B." All emphasis in quoted matter is supplied unless otherwise noted.

It assumes complete responsibility[2] for the monies and checks during transit (State Banks Ex. 1, A. 117, 119).

In September, 1966, plaintiff national bank also began operating an off-premises bank depository. This facility is located indoors in a shopping center mall situate about one mile from First National's main banking house. A receptacle for depositors' monies and night bags is maintained there, together with a writing table equipped with bank forms and a bench (See State Banks Ex. 1, A. 117, 118 for picture). The depository is serviced daily, without charge, by First National's armored car. The armored car teller identifies all monies and other items placed in the depository and immediately records them by depositor number (A. 53). The driver-guard verifies that all items were collected by the teller and signs the written bank record identifying the monies obtained at the depository (A. 53).

In performing its off-premises banking services, plaintiff national bank utilizes a "Comprehensive Dual Control Contract" and/or a "Messenger Transmittal Slip" (State Banks Ex. 2, A. 90, 91, State Banks Ex. 3, A. 122, 123-24). These forms state that First National is transporting the funds as "agent" for the depositor. The "Messenger Transmittal Slip" further provides that the funds "shall not be deemed to be a deposit" until delivered to the banking house.

Florida Statute Section 659.06(1)[3] requires the business of a bank to be transacted at its banking house or authorized drive-in and walk-up facilities. The operation of a drive-in or walk-up facility located anywhere other than the banking house and contiguous property is pro-

2. An insurance policy carried by First National covers the monies after they are received by the bank off-premises (A. 66).

3. Laws of Florida, Ch. 6426, §1 (1913).

hibited. FLA. STAT. §659.06(2).[4] By letter dated September 28, 1966, the Office of the Comptroller of the State of Florida advised First National that its off-premises banking operations violate Florida law (A. 23-24).

In October, 1966, plaintiff national bank filed an action against respondent Comptroller of the State of Florida ("defendant state comptroller") (A. 15-24). First National basically contended that it was not required to comply with Florida law because the off-premises banking operations are authorized under paramount federal law. The shopping center depository was alleged to be authorized by a letter dated June 29, 1966, written by regional counsel for the Comptroller of the Currency (A. 21-22). Bank armored car operations allegedly were permitted by the Comptroller of the Currency pursuant to Paragraph 7490 of THE COMPTROLLER'S MANUAL FOR NATIONAL BANKS. It provides that:

> "To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer." (A. 381-82).[5]

Respondents The Hillsboro Bank, Peoples Bank of Lakeland, and First Ruskin Bank ("defendant state

4. Laws of Florida, Ch. 28016 (1953), as amended, FLORIDA STATUTES, Ch. 276 (1965).

5. This ruling was announced by Comptroller of the Currency James J. Saxon in December, 1963, in THE NATIONAL BANKING REVIEW at 264.

banks"), three state banks serving the same trade area as First National, were permitted to intervene as parties defendant. Petitioner William B. Camp, Comptroller of the Currency of the United States ("plaintiff national comptroller" or "the Comptroller"), intervened as a party plaintiff. After the case was at issue,[6] plaintiffs filed motions for summary judgment (A. 177-89).

Defendants sought by timely interrogatories, depositions, and motions to produce to elicit facts regarding the actual, day-to-day method by which First National performed the off-premises banking operations. However, the District Court severely restricted defendants' efforts to utilize federal discovery procedures (A. 213-19). For instance, it held that defendants were entitled to discovery from only five customer-users, to be selected by First National, in order to ascertain the precise nature of the off-premises banking operations (A. 219). The District Court rendered its discovery orders on the basis of its holding that plaintiffs only needed to establish that First National's off-premises banking operations are performed in "substantial" compliance with the "theory of the operation" in order to prevail by summary judgment (A. 218). As a result of the limited discovery permitted to them, defendants were unable to determine any pattern to the off-premises banking operations.

On May 6, 1967, the District Court granted plaintiffs a partial summary judgment (A. 365-75).[7] In doing so, the District Court ignored conflicts of material fact and refused to evaluate the available factual evidence as to whether First National is receiving deposits and/or cashing checks off-premises (A. 373-74). Instead, it ruled

6. Plaintiffs' complaints are at A. 15-24, 152-61 and defendants' answers are at A. 28-47.

7. 274 F. Supp. 449.

that the contracts used by First National were "unambiguous" and that parol evidence was inadmissible as to these issues (A. 371).[8] The District Court held that the contractual documents used in the off-premises banking transactions establish as a matter of law that First National acts as agent for its customers and is not receiving deposits or cashing checks off-premises (A. 371).

In entering summary judgment for plaintiffs, the District Court expressly found that First National was cashing checks for customers off-premises (A. 374). However, the Court stated that this finding was irrelevant because First National had carried out its theory of operation "to a substantial degree" (A. 373-74). Accordingly, the Court held there was no violation of 12 U. S. C. §36 and §81 as a matter of law. Final judgment was entered against defendants on June 2, 1967 (A. 376-78).[9]

The Fifth Circuit Court of Appeals reversed,[10] holding that plaintiff national bank's armored car and shopping center depository operations constitute branch banking under 12 U. S. C. §36 (A. 400). After examining Florida Statute §659.06, the Circuit Court held that such off-premises banking activities are not authorized under Florida law (A. 408-09).

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8. These holdings were assigned as error and argued to the Court of Appeals. However, the Court did not pass upon these points in reversing the District Court's decision.

9. The District Court refused to rule upon the question of whether the off-premises banking operations are authorized as implied powers of national banks under 12 U. S. C. §24 (seventh), although this point was placed in issue (A. 376).

10. 400 F. 2d 548 (1968); A. 390-409.

SUMMARY OF ARGUMENT

Title 12 U. S. C. §36 provides that national banks may establish branch banks only if branching is authorized under state law. A "branch" is broadly defined in section 36(f) as any bank, office, agency, additional office, or place of business where "deposits are received, or checks paid, or money lent." Florida law does not authorize branch banking. FLA. STAT. Ch. 659.

Plaintiffs contend herein that section 36(f) constitutes an "exclusive" federal definition of a "branch." The Court of Appeals held, on the other hand, that this section is a "partial, functional" definition governing the threshold determination of what off-premises banking activities by national banks constitute "branching."

For purposes of this case, it makes no difference which construction is correct. This is so because First National is in fact receiving deposits and cashing checks off-premises by its armored car and depository operations.

First National obtains possession of its depositors' funds away from the main banking house. It accepts responsibility for these monies as soon as it receives them off-premises. It is thereby "receiving deposits" off-premises. Further, as the District Court expressly found, First National is cashing checks off-premises (A. 374). It is therefore branch banking under the terms and intent of section 36(f).

First National seeks to avoid the express prohibitions of section 36 by using contractual devices in performing its off-premises banking services. It provides by contract that it receives the monies off-premises as "agent" for the depositors and that the monies are not "deemed to be deposits" until brought by First National to the banking house.

The sole purpose of these contracts is evasion of the federal branch banking law. Although deposits are a mat-

ter of contract, it is well-settled that a bank and its depositors cannot "contract around" statutory law or policy. 5A MICHIE, BANKS AND BANKING §1 at 13; 10 AM. JUR. 2d *Banks* §338 (1963); 9 C.J.S. *Banks and Banking* §267 at 547 (1938). Further, this court has consistently refused to permit such contractual evasion of statutes. *United States* v. *City of San Francisco*, 310 U.S. 16 (1940); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). Accordingly, the Court of Appeals properly held that First National could not avoid the statutory branching provisions by means of such "paper evasions" (A. 406-07).

The legislative history of the federal branching act[11] demonstrates that off-premises banking operations such as those performed here by First National were intended by Congress to be prohibited to national banks as branch banking unless authorized under state law.

Prior to passage of the McFadden Act, national banks were performing exactly the same off-premises banking services now performed by First National. Such limited off-premises banking operations had been ruled by the Attorney General of the United States to be lawful ancillary activities of national banks rather than illegal branch banking. 29 OP. ATT'Y GEN. 81 (1911). Congress clearly expressed its belief that, contrary to the opinion of the Attorney General, such off-premises banking activities in fact amounted to branch banking. It, therefore, provided in the McFadden Act that off-premises agencies and places of business affording even one banking service, such as the receipt of deposits, is included within the definition of a "branch".

The Comptroller's assertion that Congress was concerned with expanding the ability of national banks to compete effectively with state banks and not with cut-

11. The McFadden Act, 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. §36(c) (1964).

ting back on off-premises services then being performed by national banks is premised on an erroneous assumption.

In the McFadden Act, Congress enlarged the powers of national banks to perform such off-premises banking services, but it did so *only* to the extent that state banks were granted this power under state law. At the same time, Congress restricted the performance by national banks of off-premises branching services, including those services then being performed on the alleged authority of the Attorney General's opinion, if state law prohibited such activities by state banks.

Congress adopted state branching law as the standard for national banks pursuant to a policy of competitive equality. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It was thereby following the policy of equalization that it had early adopted in the National Bank Act in connection with important competitive banking functions such as obtaining deposits.

The Comptroller's argument that there is no overriding policy of competitive equality as to "all" off-premises activities of national banks is misdirected here. The off-premises banking operations of First National involve the functions of receiving deposits and cashing checks, the exact services defined in section 36(f) as branch banking.

Plaintiffs ignore both the Congressional intent in enacting the federal branching act and the fact that, as the Court of Appeals held, First National has attempted to evade that intent by contractual subterfuges. Instead, they rely solely on legal niceties in asserting that First National is not receiving deposits or cashing checks off-premises. However, the McFadden Act is not concerned with legalisms. It is concerned with the vital banking

functions of obtaining possession and control of monies from depositors and disbursing funds to the public. Congress intended therein to equalize the ability of state and national banks to perform these important functions away from the banking house.

First National is now performing off-premises precisely those crucial banking services that Congress intended to restrict in the McFadden Act. It should not be permitted to evade the federal branching act by contractual subterfuge. The judgment of the Court of Appeals should be affirmed for this reason alone.

Plaintiffs urge that the Court of Appeals erroneously held that state branching law solely determines what activities of a national bank constitute branch banking. They assert that such a holding permits the states to potentially prohibit "all" off-premises banking activities of national banks by defining them as branch banking.

Defendants submit that a fair reading of the decision below establishes that the Court of Appeals did not so hold. Instead, the Court of Appeals held that section 36(f) provides a broad, functional test of a "branch" that initially determines whether the activity of the national bank comes within the McFadden Act. If this purely federal threshold test of a "branch" is met, then state branching law becomes applicable to the off-premises banking activity performed by the national bank.

In any event, if the language of the Court of Appeals lacks precision in this regard, this can be easily corrected. There is no need to reverse the judgment itself in order to do so.

The construction adopted by the Court of Appeals is consistent with the language and the legislative history of the McFadden Act. In section 36(f), Congress specifically

couched its definition of a "branch" in broad, functional terms. Further, Congress stated only that the definition "shall be held to include" the activities set forth therein. The legislative history additionally demonstrates that Congress intended this section to be a partial, functional definition of a "branch" rather than an exclusive definition, as urged by the Comptroller.

The Court's approach provides a workable and practical rule that is completely consistent with federal branching policy. It precludes arbitrary state action since the federal courts have the final say as to whether any particular off-premises activity of a national bank is a "branch" under section 36(f). At the same time, it recognizes "branching" as a practical, functional matter and thereby precludes arbitrary action by the national Comptroller on the basis of legalisms such as those relied on here.

One last point must be mentioned. Although final judgment can be properly affirmed for defendants, final judgment *cannot* be entered for plaintiffs on the basis of the record herein. If the holding of the Court of Appeals that the off-premises banking operations of First National constitute illegal branch banking is reversed, there are material issues of fact that must first be resolved before final judgment can be entered for plaintiffs.

ARGUMENT

I. Plaintiff National Bank Is Receiving Deposits and Cashing Checks Away from Its Main Banking House in Violation of 12 U.S.C. §36.

Section 36(f) defines a branch as those places away from the main banking house where "deposits are received, or checks paid, or money lent." The off-premises banking operations of First National include the receipt of deposits

and cashing of checks away from the banking house. Therefore, First National is branch banking within the express terms of the federal definition of a branch.

A. THE LEGISLATIVE HISTORY OF THE FEDERAL BRANCHING ACT ESTABLISHES THAT OFF-PREMISES BANKING OPERATIONS OF THE NATURE PERFORMED HEREIN BY FIRST NATIONAL WERE INTENDED BY CONGRESS TO BE DEFINED AS BRANCH BANKING AND ENCOMPASSED BY THE PROVISIONS OF SECTION 36.

A review of the legislative history of the federal branching act demonstrates the positive and unequivocal Congressional intent to prohibit off-premises banking operations by national banks, such as those performed herein by First National, unless permitted to state banks under state law.

1. *Off-premises banking prior to 1927.*

Prior to 1927 and passage of the McFadden Act, national banks had no legal power to branch bank except under certain exceptions specified by Congress. *First National Bank* v. *Missouri,* 263 U.S. 640 (1924). Nevertheless, national banks were performing a variety of banking services, ranging from the receipt of deposits to a full banking business, at places away from the main banking house. As a result, it was apparent to Congress that national banks were widely and freely branching through various subterfuges. 66 CONG. REC. 1577, 1632, 1779, 4410 (1925).

Although the legality of these off-premises banking operations was doubted by most Congressmen,[12] they were explicitly authorized by the Comptroller of the Currency. 66 CONG. REC. 4432-33 (1925). This was ostensibly

12. See, for instance, 65 CONG. REC. 11298 (1924); 66 CONG. REC. 1578 (1925); 67 CONG. REC. 2841, 3230 (1926); 68 CONG. REC. 3822 (1927).

done in order to allow national banks to compete with state banks in those states authorizing branch banking. However, off-premises banking operations were also performed by national banks in states prohibiting branching. 66 CONG. REC. 1577, 4434 (1925).

The basis for the Comptroller's authorization of such off-premises banking operations was a 1911 opinion of the United States Attorney General. 29 OP. ATTY. GEN. 81. It is this same opinion which plaintiff Comptroller heavily relies upon here (C.B. 17, 29). In this opinion, the Attorney General relied upon *inter alia, Bank of Augusta* v. *Earle,* 38 U.S. (13 Pet.) 519 (1839) and *Merchants' Bank* v. *State Bank,* 77 U.S. (10 Wall.) 604 (1870),[13] also relied upon by plaintiff Comptroller here (C.B. 16). The Attorney General concluded that national banks could "maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business." *Id.* at 86. It was accordingly held that national banks could appoint agents to "receive and forward to it at its place of business the money of persons who desire to deposit with it." *Id.* at 90.

The Attorney General ruled that the establishment of such off-premises agencies did not constitute a branch, which he characterized as a separate bank that performs all aspects of the banking business. *Id.* at 88. However, he cautioned that "'*nominal establishment of agencies might easily result in the practical establishment of a net-*

13. In these decisions, the United States Supreme Court recognized that some business of every bank is "unavoidably done at the proper place" away from its office by its employees or agents. *Merchants' Bank, supra.* In *Merchants' Bank, supra,* the power of the national bank to pay for gold at the place where it was purchased was upheld. In *Bank of Augusta, supra,* the right of a bank to purchase and discount bills of exchange away from the banking house was sustained.

work of branch banks throughout the home State or in other States.'" *Id.* at 88. This is exactly what was to happen.

In 1924, the United States Supreme Court held that national banks had no express or implied power to branch bank. *First National Bank* v. *Missouri,* 263 U.S. 640 (1924). The 1911 opinion of the Attorney General was cited for this proposition. The Court specifically disapproved a subsequent opinion that national banks could establish off-premises offices for the performance of such services as the receipt of deposits and cashing checks. *Id.* at 658, *citing* 34 OP. ATTY. GEN. 1 (1923).

The Comptroller of the Currency continued to rely upon the Attorney General's 1911 ruling that agencies for limited banking services did not constitute branching. He interpreted the *Missouri* case as "having application only to branch banks which do a complete banking business, and not to branch banks which only receive deposits and cash checks. . . ." 66 CONG. REC. 1577 (1925). Therefore, he still authorized the operation by national banks of off-premises agencies and teller's windows where limited banking services, such as the receipt of deposits and cashing of checks, were provided. *Id.* Included among such off-premises banking services were various armored car operations.

Thus, prior to enactment of the McFadden Act, national banks were performing precisely the same off-premises banking services as are involved in the instant case. It was then contended, just as it is now, that such limited off-premises banking operations did not constitute branch banking but rather were lawful, incidental powers of national banks.

2. *The McFadden Act.*

It was clear to Congress that there was a conflict among the opinions of the Attorney General, the decision of the Supreme Court in the *Missouri* case, and the fact that the Comptroller of the Currency was authorizing national banks to perform various banking services off-premises. 66 CONG. REC. 1777 (1925). It was equally clear that the legal inability of national banks to branch in states permitting branch banking placed those national banks at a severe competitive disadvantage. H. R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924). Accordingly, Congress concluded it should affirmatively determine the rights of national banks to branch bank. 66 CONG. REC. 1777 (1925).

In 1927, Congress enacted the McFadden Act. National banks were authorized therein to branch bank if state banks were permitted to do so under state law. The term "branch" was defined as including any bank, office, agency, additional office, or place of business at which deposits are received, checks paid, or money loaned.[14]

The Comptroller of the Currency now contends that the McFadden Act incorporates the definition of a "branch" set forth in the 1911 opinion of the Attorney General (C.B. 28-29). He asserts that Congress defined a "branch" as a bank performing all aspects of the general business of banking (C.B. 28-29). Congress allegedly did not consider the off-premises performance of individual banking functions, such as those involved here, to constitute branching but instead affirmed that such operations were "lawful ancillary activities" of national banks (C.B. 20-21).

14. This statutory definition has never been amended.

The Comptroller's contention is not tenable in light of the branch banking provisions adopted by Congress and the legislative debates thereon.

The very words of the McFadden Act demonstrate that limited off-premises banking operations are encompassed by the branching provisions of section 36. Contrary to the Comptroller's contention, Congress expressly defined a branch as including a place where only one banking function—either receiving deposits, or cashing checks, or making loans—may be performed. 12 U. S. C. §36(f). Further, Congress' use of the word "include" in section 36(f) indicates its intent to provide a broad definition encompassing off-premises facilities for limited but important banking functions, as well as a branch performing the general banking business.

The provisions of section 36(f) establish Congress' rejection of the Attorney General's 1911 ruling that a limited bank operation for the receipt of deposits or cashing checks is not branching. Certainly Congress did not define a "branch" in terms of the performance of a general banking business, which was the definition used by the Attorney General in his opinion and which is now urged by the Comptroller here.

Legislative debates emphasize that Congress fully intended to include the performance of limited off-premises banking services in the definition of a "branch."

As previously noted, national banks were branch banking prior to passage of the McFadden Act. In some instances, the branches provided all general banking services. 66 CONG. REC. 4434 (1925). However, other branches performed only one or two banking functions.

Senator Pepper declared that national banks were branch banking[15] by establishing:

> "what are called tellers' windows, where a limited amount of business is done *in respect of the receipt of money and the cashing of checks.* . . ." 66 CONG. REC. 4410 (1925).[16]

Congressman Lozier similarly noted that, in many states, the "so-called branch banks are merely 'tellers' windows' where deposits are received and money paid out, but where no other business is transacted." 66 CONG. REC. 1764 (1925). Representative Kurtz observed that "usually these branches only exist for the purpose of receiving deposits." 67 CONG. REC. 2855 (1926).

Recognizing that national banks were then freely performing limited, off-premises banking functions, just as first national is now doing, Congress expressed its intent to regulate and restrict such activities as branch banking. 67 CONG. REC. 2855 (1926).

This precise point was discussed by Representative Stevenson:

> "you have branches in the Federal reserve system established by the dictum of the Comptroller of the Currency, who has assumed to say that he can allow a national bank to establish as many agencies for re-

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15. Congressman La Guardia emphatically declared that:

"The law is being violated every time the comptroller gives a certificate for one of these teller windows. It is [not—sic] even an attempt to get around the law; it is a crude and outright violation of the law." 67 CONG. REC. 3230 (1926).

Congressman Morrish characterized tellers' windows as "subterfuge branch banks." 66 CONG. REC. 927 (1924).

16. The off-premises banking operations involved here are essentially the same as the teller's windows. The armored car service of First National is simply a mobile teller's window. The shopping center depository is essentially a mechanical teller's window. The same basic banking functions of getting monies for deposit from the public and/or paying out monies to the public are performed in both instances.

> ceiving deposits and paying checks as he sees fit. . . . *I will show presently that we cut that out, root and branch.*" 66 CONG. REC. 1627 (1925).

After quoting the definition of a "branch" contained in the McFadden Act, Representative Stevenson declared that "you take away from the comptroller the right to say that banks can maintain offices at which they can pay checks and receive deposits." 66 CONG. REC. 1628 (1925). Senator Pepper similarly observed that *"the definition of a branch contained in one of the sections of the bill is broad enough to include the so-called teller's window, or something of that sort, which would not be a branch bank within the meaning of the [Missouri] decision of the Supreme Court."* 67 CONG. REC. 8296 (1926).

In referring to the spread of the teller's windows, Representative Stevenson declared that "we stop that very thing. . . ." 67 CONG. REC. 2860 (1926). Representative Black stated that "I do not approve of the teller window proposition, and this bill prohibits any further exercise of that power." 67 CONG. REC. 3238 (1926).

Representative Williamson, in discussing the intent of the proposed branching bill, stated that "the bill will *also* put an end to the establishment of teller windows, offices, and agencies, that is now being done all over the country by national banks even in those States prohibiting branch banking." 67 CONG. REC. 3232 (1926). Representative Nelson flatly characterized "branch banks, 'additional offices' or 'agencies,' or whatever may be the form of the transgression" as illegal branch banking. 67 CONG. REC. 2841 (1926).

Clearly Congress restricted such limited banking operations of national banks as branching. Nevertheless, these same off-premises banking services, albeit in more modern form, are now being performed by national banks.

Plaintiffs argue that Congress defined a branch solely in terms of a place where the legal debtor-creditor relationship is finalized in connection with the banking operations of receiving deposits, cashing checks, or making loans. In this connection it is argued that the definition of "deposit" expressly set forth in the Banking Act of 1935,[17] dealing with the Federal Deposit Corporation, establishes the meaning of "receiving deposits" in the federal branching act of 1927.[18]

Such a construction is not consistent with the terms and policy of the McFadden Act.

All deposits may be divided into two classes, namely, special and general. *Marine Bank* v. *Fulton Co. Bank,* 69 U.S. (2 Wall.) 252, 256 (1865). A "general" deposit is predicated upon a debtor-creditor relationship whereas a "special" deposit creates a principal-agent relationship between the bank and its customers. *Id.*

The McFadden Act defined a branch in terms of, *inter alia,* a place where deposits are received. No distinction was made therein between "general" and "special" deposits.

On the other hand, the definition of "deposit" used in the 1935 F.D.I.C. act specifically encompassed only "general" deposits. That act dealt with federal insurance of deposits. It was concerned with the technical *liability* of banks for their deposits, a matter directly related to the legal formation of a debtor-creditor relationship. For purposes of insuring deposits, Congress made a debtor-creditor relationship the determining factor of a "deposit."

17. 49 Stat. 685-86, 12 U.S.C. §1813.

18. Certainly this 1935 statute is no part of the legislative history of a much earlier and entirely different statute. *NLRB* v. *Lion Oil,* 352 U.S. 282 (1957).

There is a logical reason why the McFadden Act contains no such restrictive definition of "deposits." The federal branching act of 1927 was not concerned with the legal liability of the banks for deposits. It was concerned with the off-premises performance of mainstream banking functions involving the acquisition and control of the funds of depositors. This function is performed when the bank obtains control of the monies, regardless of whether the monies are technically characterized as "general" or "special" deposits.

Representative McFadden consistently stressed that the definition of a branch bank contained therein defined branching in terms of *"service."* 66 CONG. REC. 1645, 1767, 1770, 1778 (1925). After passage of the act, he stated that a branch was defined as "[a]*ny* place outside or away from the main office *where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office*. . . ." 68 CONG. REC. 5816 (1927). The performance of banking services off-premises does not depend upon immediate, legal consummation of the debtor-creditor relationship. It depends only upon the *functional* performance of a basic service off-premises. The legislative history simply is not consistent with plaintiffs' narrow focus on a technical creation of the debtor-creditor relationship in banking transactions as the definitive characteristic of a branch.

The possible convenience afforded to bank customers by the availability of off-premises banking services was recognized by Congress. However, Congress did *not* resolve the branching question pursuant to such considerations. It looked to more basic concerns. Recognizing that the power of a bank to perform important banking services off-premises constitutes a significant competitive

advantage, Congress resolved the matter by equalizing this competition between state and national banks.

Accordingly, Congress did enlarge the powers of national banks to perform off-premises banking operations,[19] but *only* to the extent necessary to permit them to compete with state banks that could branch. At the same time, Congress prohibited such practices by national banks, including those limited off-premises banking operations theretofore permitted by the Comptroller of the Currency, if state banks were not permitted under state law to perform them.[20]

Representative Celler stated in this regard that:

> "We have seen what the Comptroller of the Currency has done with reference to wholesale granting of teller-window applications to banks in the city of New York and in the city of Washington. *We must circumscribe the powers of opening branch banks; but if you are going to fix any powers, see to it that they shall apply equally to national banks as well as State member banks.*" 67 CONG. REC. 3241 (1926).

Representative Williams cogently summed the matter up by stating that it was only proposed *"to give to national-banks the opportunity of legitimately meeting competi-*

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19. It is true, as argued by the Comptroller, that Congress intended in the McFadden Act to enlarge certain other powers of national banks in order to permit them to carry on a "full-fledged and efficient modern banking business" (C.B. 20-21). However, these powers in no way relate to off-premises banking operations such as those herein. 67 CONG. REC. 2828-29 (1926). And, even in connection with those powers, Congress applied a policy of enlarging the powers of national banks *only* to the extent necessary to establish competitive equality between state and national banks. 67 CONG. REC. 2828 (1926); 68 CONG. REC. 5815 (1927).

20. Representative Watkins noted that the bill "circumscribes and curtails the present facilities and fields for branch banking. . . ." 66 CONG. REC. 1775 (1925). Similarly, Representative Williamson emphasized that the McFadden Act "clearly restricts the present branch banking privileges of national banks." 66 CONG. REC. 1756 (1925).

tion in those States where that kind of competition exists. . . ." 66 CONG. REC. 1634 (1925).

In 1933, various amendments were made to the McFadden Act.[21] National banks were given the power to engage in state-wide branching but only if this was authorized by state statute law and subject to state law. 12 U. S. C. §36(c)(2).[22] Representative Luce, a member of the Conference Committee, reported to the House that:

> "it is not, however, here proposed to give the advocates of branch banking any advantage. *We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches.*" 77 CONG. REC. 5896 (1933).

The power of national banks to perform off-premises banking operations was thus enlarged and, at the same time, restricted in the McFadden Act by adopting state branching law as the standard for national banks.

In determining that the off-premises banking operations of First National constitute branch banking, the Court of Appeals took cognizance of this statutory policy.[23] The Court concluded that, in view of the Congressional intent to establish competitive equality, "if we construed Section 36(f) as permitting paper evasions from state anti-

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21. 48 Stat. 189-90, 12 U.S.C. §36(c) (1933). The Comptroller of the Currency and some Congressmen had strongly pushed for statutory authorization of state-wide branching powers for national banks regardless of state branching restrictions. Senate Bill 4412, commonly called the Glass Bill; *see* 75 CONG. REC. 9986 (1932) and 76 CONG. REC. 1449 (1933). However, Congress refused to go along with this proposal.

22. The legislative history of these amendments is extensively reviewed in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

23. In contrast, the District Court did not in any way consider this policy of competitive equality in entering its summary judgment for plaintiffs (A. 373).

branching laws, we would be letting the left hand give and the right hand take away." (A. 407).

The Comptroller now attacks the Court's deference to this Congressional policy, asserting that "the goal of equality that the court of appeals sought to serve is chimerical. . . ." (C.B. 10). He summarily dismisses the policy of "competitive equality" as a "catchy" phrase and "slogan" (C.B. 15, 21). Such arbitrary disregard of Congressional policy is unwarranted.

Congress clearly intended to insure competitive equality in branch banking between state and national banks by the McFadden Act. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In so doing, Congress was simply continuing "its policy of equalization first adopted in the National Bank Act of 1864." *Id.* at 261.[24]

The policy of competitive equality has been particularly honored in connection with vital banking functions such as obtaining deposits.[25] For instance, in *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934), the question arose whether a federal statutory provision authorizing a national bank to "give security" for state deposits contemplated a pledge of specific assets or a general lien upon the bank's assets. State banks were empowered

24. Congress early decided upon a general "policy of equalization" by adopting state law as the standard for national banks in most of the important competitive areas. In addition to specifically applying state law to national banks in many instances, Congress did not occupy the field so as to preclude the application of state laws that do not conflict with federal law to national banks. *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944); *First National Bank* v. *Missouri*, 263 U.S. 640 (1924); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

25. Pursuant to this policy, Congress has prohibited national banks from paying a greater rate of interest on time and savings deposits than the maximum rate authorized by state law. 44 Stat. 1224-25, 12 U.S.C. §371 (1964). *See also, Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), where this Court held that state law was controlling as to deposits of national banks in the absence of conflicting federal law.

to provide a general lien, which constituted the more impressive security. This Court held that national banks could provide the general lien because of the "policy of equalization" that Congress had adopted in the National Bank Act. In so holding, the Court recognized that "without such power national banks would not in Georgia be upon an equality with state banks in *competing for deposits*." 292 U.S. at 564-65.

The Comptroller argues, however, that the Congressional concept of competitive equality was narrowly limited to the branch banking powers and that national banks are not intended to be "exact facsimiles" of state banks with regard to all banking powers (C.B. 15).

In arguing that there is no overriding principle of competitive equality that limits *all* off-premises services of national banks to those state banks can provide, *the Comptroller misses the whole point of this case.* The issue here is not whether national banks can perform new business solicitation, credit card services, various correspondent services, and the like, off-premises. The issue here is whether national banks can perform off-premises banking activities involving the heart of banking, namely, the receipt and control of money, and whether contractual devices and subterfuges can be employed to evade the Congressional definition of branching, thereby frustrating a national policy.

The legislative history of section 36, and particularly that relating to teller's windows and agencies for the receipt of deposits or cashing of checks, demonstrates that First National is performing off-premises banking services considered by Congress to be branch banking. Plaintiff national bank is operating at a substantial competitive advantage in the fundamental banking areas of receiving monies for deposits and making monies available to the

public. If First National were not utilizing its so-called "deposit" and "agency" contracts, the off-premises armored car and depository bank operations would be peremptorily prohibited as illegal branch banking. The Congressional policy of equalization should control the determination of whether First National can perform these operations by indirection and contractual artifice.

B. Prior to Comptroller James J. Saxon's Ruling in 1963, the Comptroller of the Currency Had Long Ruled That Off-Premises Banking Operations Such As Those Performed Here by First National Constitute Branch Banking under Section 36.

Comptroller Saxon's ruling that off-premises armored car and depository operations do not constitute branch banking is directly contrary to the long-standing administrative practice of the United States Comptroller.

Prior to 1949, the Comptroller of the Currency had no general rule regarding the use by national banks of armored cars to receive deposits, deliver monies, and perform other banking services. The legality of such off-premises banking operations was simply determined on a case by case basis. An important factor in each case was whether state banks were allowed to perform such off-premises operations (R. 1441).

Around 1938, the Comptroller of the Currency made a ruling particularly significant to this case. A national bank in Miami, Florida, was using an armored car to pick up deposits from customers as far away as Homestead, some 40 miles from Miami. The Comptroller of the Currency required the national bank to stop its armored car operation because Florida law[26] prohibits branch banking. American Banker, November 14, 1957.

26. Since 1913, Florida Statute Section 659.06 has required the banking business of a state bank to be performed at its banking house.

By 1949, the Comptroller of the Currency was consistently ruling that the pick-up of deposits and the cashing of checks by a national bank armored car constituted branch banking (R. 1471). On the other hand, there was considered to be no branch banking if the armored car service was performed by *"some other party* who is acting as agent for the depositor *so that the bank would not take possession of the currency and checks until the same have actually been received at the banking premises."* (R. 1459).

In enforcing this ruling, the Comptroller of the Currency made it abundantly clear that no fictitious agency relationship could be employed to frustrate the law. There had to be a true agency or independent contractor relationship between the bank customer and the armored car service (R. 1472). For instance, in 1953, it was held that, if the armored car service acts as representative of the bank or is compensated by the bank, there would be an "illegal branch banking activity" since the service would be acting as agent for the bank (R. 1466).

In late 1963, Comptroller Saxon reversed this long-standing position. He ruled that, regardless of federal or state branching law, a national bank could pick up deposits and perform other banking services off-premises by using an agreement stating the bank was acting as agent for the customer.

This construction, made some thirty-six years after enactment of the McFadden Act, is absolutely unique. It is not based upon any factors reflecting the Comptroller's specialized experience or specific investigations. *Cf. Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944). It simply reflects the philosophy of an administrative official seeking to override the expressed intent of Congress. It is in no way entitled to be given controlling weight.

C. Plaintiff National Bank Is Receiving Deposits Off-Premises in Violation of Section 36.

Plaintiffs argue that a deposit is a purely contractual relationship and that a bank has the absolute right to contract with its customers regarding deposits. It is contended that First National is not receiving deposits off-premises because it utilizes contractual documents providing that the monies are received by the bank off-premises as agent for the depositors and that these funds are not deemed to be deposits until they reach the banking house.

The District Court accepted this contention. It held that the question whether First National is receiving deposits or cashing checks away from its banking house is resolved as a matter of law by First National's deposit and agency contracts (A. 371).

The District Court did *not*, as stated by both plaintiffs,[27] resolve this question on the basis of depositions or other factual evidence relating to the performance of the off-premises operations. On the contrary, the Court explicitly disregarded this conflicting evidence and held that such evidence was irrelevant (A. 371, 374). The District Court entered a summary judgment for plaintiffs solely on the basis of the "unambiguous" contracts used by First National in its off-premises banking transactions. In so doing, it erred in summarily ruling on disputed facts and excluding parol evidence. Moreover, it improperly rejected defendants' arguments of subterfuge and violations of public policy. Further, it disregarded its own factual finding that First National was cashing checks off-premises.[28]

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27. C.B. 5, 42; B.B. 9, 24.

28. Defendants raised the error of these rulings before the Court of Appeals, asserting, *inter alia*, that there was conflict of material fact and that the parol evidence rule applies only to parties to the contract or their privies, and not to a stranger thereto like defendants here. *Scofield* v. *Greer*, 185 F.2d 551 (5th Cir. 1950); *Patterson* v. *Texas Co.*, 131 F.2d 998 (5th Cir. 1942), *cert. denied*, 319 U.S. 761 (1943).

The Court of Appeals rejected the District Court's conclusion that the contracts of First National establish it is not branch banking (A. 400). The contention that First National "has not established offices or agencies, where, as specified in Section 36(f), 'deposits are received, or checks paid, or money lent' " was succinctly dismissed by the Court of Appeals as "indefensible." (A. 400). The Court subsequently observed that "we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language." (A. 406). Recognizing that Congress intended to insure competitive equality in the branch banking area by adopting state law as the standard for national banks as well as state banks, the Court of Appeals refused to condone "paper evasions" of the branch banking laws (A. 407).

The decision of the Court of Appeals to look to substance rather than form in deciding that First National is receiving deposits or cashing checks off-premises is consistent with established law.

1. *The contracts of First National are subterfuges used for the purpose of evading federal branching law and were properly disregarded by the Court of Appeals.*

Deposits are clearly a matter of contract, and a bank and its customers may contract as to their relationship and respective rights. However, as urged before the Court of Appeals, this principle is subject to a well-established limitation that a bank and its customers may *not* "contract around" statutory prohibitions or public policy. 10 AM. JUR. 2d *Banks* §338 (1963); 9 C.J.S. *Banks & Banking* §267 at 547 (1938); 5A MICHIE, BANKS & BANKING §1 at 13. This limitation is controlling here.

Throughout this litigation, it has never been suggested by plaintiffs that First National's contracts are used for any

purpose other than evasion of the federal branch banking law.[29] Indeed, Comptroller Saxon has stated that the so-called "agency" and "deposits" contracts are required under paragraph 7490 in order to avoid the prohibitions of section 36 (R. 1493).

The United States Supreme Court has consistently refused to sanction evasion of statutory provisions or policy by means of contractual subterfuges.

In *United States* v. *City of San Francisco*, 310 U.S. 16 (1940), this Court reviewed a federal statute that granted governmental lands to cities for power projects. The statute expressly prohibited cities accepting such lands from selling or letting the right to sell the electric energy produced thereon. The City of San Francisco received a land grant pursuant to this statute. It then "consigned" the power produced on the land to a private utility, for subsequent sale and distribution as "agent" of the City. In finding a statutory violation, the Court held that terminology of consignment rather than sale of the power and "verbal description of the power Company as the City's agent" did not take the parties' action out of the statute. The Court concluded that:

> "The City has in fact followed a course of conduct which Congress, by Section 6, has forbidden. *Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law.*" *Id.* at 28.

See also, Bartels v. *Birmingham*, 332 U.S. 126 (1947).

The point is perhaps most succinctly stated in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964):

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29. The contracts serve no legitimate business purpose. For example, they do not contain any provision limiting the bank's liability for the funds, as do deposit contracts for funds placed in night depositories.

> "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to make legality for antitrust purposes turn on clever draftsmanship. *We refuse to let a matter so vital to a competitive system rest on such easy manipulation.*" *Id.* at 24.

The overriding policy of the federal branching act is one of competitive equality between state and national banks. Like the policy of free competition in the antitrust laws, this policy of equal competition should not depend on "clever draftsmanship."

The holding of the Court of Appeals below is also consistent with a number of decisions that have struck down various devices to avoid statutory prohibitions of branch banking. In *Whitney National Bank* v. *Bank of New Orleans & Trust Company*, 323 F.2d 290, 301 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), the Court of Appeals for the District of Columbia found a branching operation, holding that "[t]he nature of the arrangement, and not the label applied to it, determines the character of the relationship between two banking institutions." Accord: *First National Bank* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962); *Marion National Bank* v. *Saxon*, 261 F. Supp. 373 (N.D. Ind. 1966); *Continental Bank and Trust Co.* v. *Taylor*, 14 Utah 2d 370, 384 P.2d 796 (1963); *Thrift, Inc.* v. *State Bank & Trust Co.*, 298 Ill. App. 501, 19 N.E.2d 126 (1939).

Defendants submit that, as the Court of Appeals held, the so-called "agency" and "deposit" agreements utilized by First National are purely subterfuges to evade the federal branching statute. They should not be judicially approved. Any other holding would ignore the realities of the situation.

Factually, First National does receive deposits at its armored car and shopping center depository.

For example, plaintiff national bank obtains possession and control of its depositors' funds in the regular course of its business of banking away from the banking house. As in any other deposit transaction, responsibility for the monies is assumed by plaintiff national bank as soon as it obtains possession thereof.

Further, although plaintiffs consistently characterize the off-premises banking operations as a "messenger service" in their briefs here, they previously had no difficulty in recognizing that First National is in essence receiving deposits off-premises. Each of the plaintiffs has characterized the funds that the bank receives off-premises as "deposits." Paragraph 7490, *The Comptroller's Manual for National Banks,* refers to "deposits collected" by the bank armored car (A. 381). Similarly, in announcing the establishment of its off-premises banking services, the president of First National explained that:

> " 'First National will send this car to all of its commercial customers to *collect deposits.*
>
> 'Individuals may also *place deposits* in this car for transmittal to the bank' " (A. 385)

Without exception, the customers of First National referred to the monies which they delivered to the off-premises bank armored car employee or placed in the shopping center depository as "deposits." (A. 221, 231, 275, 280, 302, 307, 318, 329, 333).

Every aspect of First National's off-premises armored car and depository operations directly relates to the functional receipt of deposits by the bank. It accepts possession of, and responsibility for, monies of its depositors. It does so for the sole purpose of crediting these funds to the depositors' accounts with First Na-

tional. The monies received by First National off-premises are, of course, invariably credited to the depositors' accounts.

The "deposit" and "agency" contracts are used solely in order to permit First National to perform by indirection branching operations expressly prohibited to it under federal statute. Hence, these contracts frustrate federal and state branching laws and policy. The Court of Appeals below properly refused to permit First National to avoid statutory branching prohibitions by such "paper evasions."

2. *First National is receiving deposits by its off-premises armored car and shopping center depository operations within the meaning and intent of the federal branch banking act.*

Plaintiffs ignore defendants' contention, and the holding of the Court of Appeals, that the "agency" and "deposit" contracts used by First National are subterfuges to evade branch banking law. Instead, they resort to legalisms in dealing with federal branching provisions and policy. No such approach was ever contemplated by Congress.

Plaintiffs ignore the fact that the federal branching act deals with practical matters of control and disposition of money. It is concerned with the basic banking functions of obtaining possession of the depositors' monies and disbursing monies to customers. In the McFadden Act, Congress equalized the ability of state and national banks to perform these fundamental banking activities at places other than the main banking house.

The McFadden Act is not concerned with banking legalisms. It does not incorporate the technical approach to banking transactions that is generally employed by legislatures and courts in dealing with a bank's liability for monies. For instance, unlike the F.D.I.C. act, the McFadden

Act does not contain a definition of a "deposit" in terms of the debtor-creditor relationship (*Supra* at 19). Congress knew how to define a branch in legalistic terms if it had so desired. There is nothing in either the language or the legislative history of the McFadden Act demonstrating that Congress intended to narrowly limit the federal definition of a branch to facilities where a debtor-creditor relationship is established.

In the instant case, the issue is [illegible] First National is receiving deposits off-premises. This issue must be evaluated in the context of the McFadden Act.

The cases relied upon by plaintiffs are *not* relevant here. The cases deal only with the legal issue of when a debtor-creditor relationship arises for purposes of determining the bank's liability for monies. No case has been cited dealing with "receipt" of deposits, either in the context of the McFadden Act or any other context.

Receipt is a physical fact. It is clearly established here. The only remaining question is *who* is receiving the deposits.

Plaintiffs argue that First National is not "receiving deposits" off-premises because it receives the monies as "agent" for the depositor (B.B. 29; C.B. 43). It is asserted that this "agency" relationship obviates any expression of consent by First National to the creation of the status of debtor and creditor at the time it takes physical possession of the funds from its depositors (C.B. 43). Plaintiffs conclude, therefore, that the monies received by the First National as "agent" are not deposits.

This contention is premised upon plaintiffs' assertion that Congress intended to narrowly define a "branch" in legalistic terms relating to the formal debtor-creditor relationship. Plaintiffs again improperly rely upon legal-

isms in this case. As previously noted, the federal branch banking act is not concerned with legal technicalities, but rather with the off-premises performance of the life-blood functions of banking: obtaining control of monies from depositors and making monies available to customers.

Even if plaintiffs were correct in asserting that the debtor-creditor relationship is the determining indicia of a branch, their argument fails for another reason. The "agency" relationship, which allegedly prevents a debtor-creditor status from arising between First National and its depositors when the monies are received by First National off-premises, does *not* exist in law or in fact.

An agency relation does not exist merely because the parties verbally characterize their relationship as such or even because they honestly intend to create such a relation.[30] *Crowe* v. *Hertz Corp.*, 382 F.2d 681 (5th Cir. 1967); RESTATEMENT (SECOND) OF AGENCY §1 at 8 (1957); 2 C.J.S. *Agency* §2 (1936); 3 AM. JUR. 2d *Agency* §21 (1962). Whether a particular relationship is an agency depends on the factual relations of the parties *as they exist*, without regard to what the parties call their relationship. In *Crowe*, 382 F.2d at 688, the Court of Appeals stated that, if a party could conclusively establish the existence or non-existence of an agency relationship by his own statements, then:

> "a large function of the fact finder's role in the decisional process would be eliminated. It would be tantamount to a rule that if Party A swears he was not *negligent*, then Party B could not prove A's negligence by circumstantial evidence." (Court's emphasis).

30. It is for this reason, *inter alia*, that the District Court erred in treating the contracts of First National as "unambiguous," rejecting parol evidence, and refusing to resolve agency as a fact. The point was assigned as error to the Court of Appeals which did not decide it as an evidentiary matter but tacitly disapproved the District Court's holding by finding the contracts to be "paper evasions."

No characteristic of an agency relationship exists here between plaintiff national bank and its customers.

One characteristic is the agent's power to bring about business relations between his principal and third persons. *Esmond Mills* v. *C.I.R.*, 132 F.2d 753 (1st Cir.) *cert. den.*, 319 U.S. 770 (1943); 3 AM JUR. 2d *Agency* §3 (1962). Here, the purported "agent", plaintiff national bank, is transacting dealings only between itself and its customers. There is no third party involved.

Control of the agent is another elementary factor in an agency relationship. *Smith* v. *Cities Service Oil Co.*, 346 F.2d 349 (7th Cir. 1965); *Manufacturers Casualty Insurance Co.* v. *Martin-Lebreton Insurance Agency*, 242 F.2d 951 (5th Cir.), *cert den.*, 355 U.S. 870 (1957); RESTATEMENT (SECOND) OF AGENCY §1 at 9 (1957). The customers here have no control whatsoever over First National's performance of its off-premises banking operations or over the monies they request from or deliver to the bank employees (R. 183-86).

Further, the primary obligation of the agent must be to act for the benefit of the principal. *Shultz* v. *Manufacturers & Traders Trust Co.*, 40 F. Supp. 675 (W.D. N.Y. 1941), *aff'd*, 128 F.2d 889 (2nd Cir.), *cert. den.*, 317 U.S. 674 (1942); RESTATEMENT (SECOND) OF AGENCY §1 (1957). Plaintiff national bank, the alleged agent in performing the off-premises banking operations, is not primarily obligated to act for the benefit of the customers.

Plaintiffs argue, however, that the contractual statement of agency only confirms a relationship that would exist in any event. In making this argument, plaintiffs do not point to any factual characteristics of an agency relationship existing between First National and its depositors. Instead, they rely solely upon cases dealing with a bank's

liability for funds received away from the bank by a bank employee *acting on his own volition.* In such cases, it is generally held that the bank employee is acting as agent of the person delivering him the money. Accordingly, the bank is not liable for such funds until they reach the bank.

There is a well-established exception to this rule if the bank *authorizes* its employees to receive the monies of depositors *away from the bank.* 5 MICHIE, BANKS & BANKING §14 at 46-47; *Nordin* v. *Eagle Rock State Bank,* 139 Cal. App. 584, 34 P.2d 490 (1934). Hence, if the bank employee accepts monies from the depositors off-premises pursuant to the direction and authorization of the bank, he is not considered to be acting as the agent for the depositors.

In the instant case, of course, First National's armored car teller receives the monies off-premises in the usual course of the bank's business and pursuant to the bank's express instructions. Certainly the above-stated exception is applicable here. First National is not receiving the monies off-premises as "agent" for its depositors under the general rule asserted by plaintiffs.

The record herein establishes that no agency relationship exists in law or fact between plaintiff national bank and its customers.[31] Indeed, the office of the Comptroller of the Currency has held in the past that the very factors involved here establish that no agency relationship is present and that the bank is accordingly branch banking by the armored car operations (R. 1466, 1472).

The fundamental purpose of the banking business is obtaining monies from customers for deposit and making monies available to the public. In enacting the McFadden

31. Further, as a matter of law, defendants at least were entitled to a trial resolving material disputes of fact and allowing further development of the national Comptroller's design in authorizing such contracts and the national bank's intent is acting upon such authority.

Act, Congress recognized that the power to perform those important banking services at a variety of locations is a significant competitive advantage.

Some thirty years after passage of the federal branching act, First National has established various places of performing its banking business away from the bank. It is there performing the mainstream banking functions with which the McFadden Act dealt. In short, as the Circuit Court expressly held, First National is doing by paper evasions that which Congress prohibited as branch banking.

D. First National Is Cashing Checks Off-Premises.

In addition to receiving deposits away from its main banking house, First National is cashing checks off-premises.

A major service of the armored car operations is the delivery of currency, including large payrolls, by First National to customers at their business premises. When a check is given to the bank employee in exchange for monies the transaction constitutes the cashing of checks away from the banking house.[32]

The District Court so found (A. 374).[33] This finding alone requires affirmance of the Court of Appeals' deci-

32. The bank utilizes a "debit slip" providing that the customer's account has been debited at the bank for the amount of the currency (A. 141). However, in many instances, no actual, funded account is debited. None exists. First National simply "debits" a fictitious, "wash-out" account (A. 210-211). These accounts *never* have any monies in them, and all transactions relating to such accounts are "paper" transactions.

33. It is stated in plaintiff national bank's brief in note 13, p. 25, that the issue of cashing checks off-premises is moot because this practice has been discontinued. There is no evidence in the record herein to support this statement and defendants have no way to confirm this is so. Furthermore, there is no prohibition in the District Court's ruling that would prevent the bank from

sion. The single function of cashing checks off-premises clearly constitutes branch banking under the express terms of section 36(f). *Jackson* v. *First National Bank of Valdosta*, 246 F. Supp. 134 (M.D. Ga. 1965).

The District Court erred in ignoring its own finding of fact. There is no justification either in section 36(f) or in proper judicial action for eliminating a crucial finding in order to sustain a decision. If part of First National's questioned operations involved check cashing, it was unquestionably engaged in branch banking.

E. If the Comptroller's Construction of Section 36(f) Were Sustained, National Banks Would Be Able to Establish and Maintain Branch Banks Irrespective of State Branching Law.

The statutes of the fifty states relating to branch banking vary considerably. They reflect the individual needs of each state resulting from different population patterns and divergent economies. It was in recognition of this fact that Congress applied state branching law to national banks rather than enacting a uniform federal branching law that would have inevitably compelled all states to permit branching in order to maintain competitive equality.

Under the Comptroller's approach to section 36, national banks would be able to establish branch banks in which the complete business of banking could be performed, irrespective of state branching law. At least arguably, the banks could establish facilities at which the customers could open accounts, obtain trust department services, purchase banking paper, purchase and redeem

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resuming this practice in the future. Hence, the question is not moot, particularly in view of plaintiff's contention that the District Court's findings should be reinstated and the fact that defendant state comptroller has been enjoined, in effect, from interfering with plaintiff's off-premises bank operations.

savings bonds, obtain change, and make loan payments. This is so because none of these banking transactions are expressly included in the section 36(f) definition of a branch. At the same facility, by employing the contractual devices authorized by the Comptroller herein, the national bank could receive deposits, cash checks, and make loans at the branch. Unlimited branching would thus be existent.

National banks should not be permitted to evade the federal branching laws by such contractual devices. If the terms and policy of section 36 can be so easily negated, obviously national banks will be able to perform complete branching operations, as well as the limited but important branching operations here. As in the instant case, this will be done in violation of state law to the ensuing competitive disadvantage of state banks. Alternatively, states will be coerced into permitting state banks to branch bank in order to effectively compete with national banks.

There has already been a considerable economic impact upon defendant state banks resulting from the off-premises banking services of First National and the competitive inequality created thereby. First National obtained a number of new, large commercial accounts as a direct result of its off-premises services (A. 383). It immediately began to handle "well over" one million dollars a week through the armored car (R. 55-56). At the same time, the Hillsboro Bank, an older state bank located together with First National in Plant City, failed to acquire the new business which it had anticipated would result from construction of a new and modern bank building (R. 667-68).

It is, therefore, no exaggeration to say that adoption of the Comptroller's construction of section 36 would spell the end of the dual banking system in those states pro-

hibiting or restricting branch banking. This is precisely what Congress sought to avoid in enacting the McFadden Act.

Defendants respectfully submit that First National is engaged in branch banking according to the terms of §36 and as contemplated by Congress. It is receiving deposits and cashing checks away from its main banking house. Florida law does not authorize state banks to perform such banking operations away from the bank premises. FLA. STAT. Ch. 659.[34] Accordingly, First National is branch banking in contravention of federal law.

II. The Court of Appeals Correctly Applied Federal and State Branching Law in Finding That First National's Off-Premises Banking Operations Constitute Illegal Branch Banking. In Any Event, However, Final Judgment Cannot Be Entered for Plaintiffs on the Basis of the Record in This Case.

The major thrust of the briefs supporting the Comptroller of Currency is the contention that the Court of Appeals held that state law alone controls the issue of what off-premises activities constitute "branching." It is asserted that the decision below thereby permits states to potentially prohibit "all" off-premises activities of national banks as branch banking. Plaintiffs express great concern for the orderly administration of national banks as a result of this alleged holding. Further, they cry alarm at the arbitrariness of states and state banking authorities as to national banks' activities.

It must be recognized at the outset that this contention of plaintiffs is unrelated to the central question here of whether First National's off-premises banking operations

34. As will be shown in Point II of this brief at pages 47-49 Florida law specifically prohibits state banks from providing such off-premises banking services.

constitute branch banking within the meaning of the McFadden Act. *In this case,* it makes no difference whether or not section 36(f) provides the sole, exclusive federal definition of a branch bank. This is so because, as demonstrated in the first portion of this brief, the simple fact is that First National's off-premises operations here do involve the receipt of deposits and cashing of checks for customers at places away from the main banking house. Consequently, it is performing those mainstream banking activities defined as branch banking under the express terms of 12 U.S.C. §36(f).

For this reason alone, the judgment of the Court of Appeals is correct and should be affirmed.

Defendants do not seek a death-lock on all off-premises banking activities. As noted, this case only involves the off-premises performance by national banks of the banking functions of receiving deposits and paying checks. Congress clearly intended these off-premises banking services, no matter how performed, to be governed by state branching law. Florida law does not authorize state banks to perform these banking services off-premises. However, plaintiffs seek to avoid the statutory provisions and intent by use of contractual artifice. Defendants only seek to assure, in turn, that the basic Florida banking laws cannot be frustrated by such devices and that national banks do not gain undue competitive advantage.

Defendants believe that the true holding of the Court of Appeals is that federal law, and not state law, initially controls the question of what activities of national banks are "branching" for purposes of the federal branch banking statute. State branching law is applicable only to those off-premises banking activities of national banks that come within the terms of section 36(f).

If the language of the Court of Appeals lacks precision, as urged by plaintiffs, it can now be clarified. This can be done without disturbing the judgment rendered by the Court of Appeals for defendants.

On the other hand, final judgment can in no event be rendered for plaintiffs in view of the state of the record of this cause. There are a number of issues of fact that must be passed upon if the judgment of the Court of Appeals for defendants is not sustained.

A. The Court of Appeals Correctly Applied Federal and State Branching Law in Finding That First National's Off-Premises Banking Operations Constitute Illegal Branch Banking.

The decision of the Court of Appeals is to some extent couched in broad, and possibly even vague, language. Defendants submit, however, that a fair reading of the decision below, when considered in the context of this case and particularly in the context of the District Court's decision, reveals that the Court of Appeals did not render the far-reaching decision asserted by plaintiffs.

The District Court held that section 36(f) constitutes the exclusive federal definition of a branch (A. 371). It then concluded that the contracts used by First National in its off-premises banking transactions prevented the activities from amounting to the receipt of deposits or the cashing of checks within the provisions of section 36(f) (A. 371). The District Court further held the off-premises banking activities of First National do not violate Florida law (A. 376-77).

Each of these holdings was properly overruled by the Court of Appeals.

1. *The Court of Appeals properly held that federal law governs the threshold determination of what off-premises banking activities of national banks constitute branching.*

The Court of Appeals held that section 36(f) is not an exclusive definition of a branch. It ruled instead that section 36(f) provides a broad, functional definition of a branch that initially determines whether an off-premises activity of a national bank falls within the McFadden Act. If this federal test is met, then state branching law becomes applicable to the activity. That this is the true rationale of the decision below is demonstrated by the Court's reliance upon the reasoning of Judge Lindberg in *State Chartered Banks* v. *Peoples National Bank,* 291 F. Supp. 180 (D.C. Wash. 1966).

In *State Chartered Banks,* the District Court stated[35] that section 36(f) determines "*prima facie* if the supplementing state branching law should come into play." *Id.* at 194-95. The Court declared the test of "branchness" to be two-fold:

> "(1) Does the facility fit the broad functional definition laid down by Congress in Section 36(f) and if so, (2) Does the state law add any more refinements to the definition?" *Id.* at 195.

It was stressed that state law comes into play *only after* a determination has been made that the off-premises operation constitutes a branch under section 36(f). As the District Court summed it up, if the off-premises operation falls within the broad, functional definition of a branch in section 36(f), "we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character." *Id.* at 196.

35. The following analysis by Judge Lindberg was quoted in its entirety by the Court of Appeals below (A. 401-06).

The Court of Appeals in this case expressly stated that it subscribed to Judge Lindberg's analysis "without hesitation." (A. 406). Defendants believe that, by so doing, the Court of Appeals made it plain that the question of what constitutes branching by national banks is initially a federal question to be determined solely by the functional provisions of section 36(f).[36] If this federal test is satisfied, then state branching law becomes applicable to the off-premises activity in question.

The Court's construction of section 36(f) as a broad, functional definition of a branch is consistent with the language and legislative history of the McFadden Act, as well as decisions of other courts.

In section 36(f), Congress provided only that the term "branch" *"shall be held to include"* any bank, office, agency, additional office, or place of business at which "deposits are received, or checks paid, or money lent." The United States Supreme Court has held that the term "include" is "not one of an all embracing definition, but connotes simply an *illustrative application of the general principle.*" *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). Hence, plaintiffs' contention that section 36(f) constitutes a narrow, all-inclusive definition of a "branch" is contrary to the precise terms of that definition.

Further, the only legislative history that expressly deals with this point indicates that Congress intended section 36(f) to be an illustrative, rather than restrictive, definition of branching. Representative McFadden described the definitional section of the act as providing that:

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36. The only Court which has, to defendants' knowledge, considered the decision below so construed it. *Jackson* v. *First National Bank of Cornelia*, 292 F. Supp. 156 (N.D. Ga. 1968).

> *"any place* outside of or away from the main office *where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office is a branch."* 68 CONG. REC. 5816 (1927).

Such a contemporaneous construction of this section by the very sponsor of the branching bill should be afforded considerable weight.

The Comptroller argues, however, that it would be "anomalous" to suggest that the meaning of the term "branch" should not be uniform within section 36 (C.B. 10). Obviously there must be uniformity as to what off-premises activities of national banks constitute a branch for purposes of this section. This uniformity is provided under the test set forth in *State Chartered Banks, supra,* and expressly adopted by the Court of Appeals herein. Thus, only those banking activities of national banks that come within the terms of section 36(f) constitute a branch. This is the case in any state of the Union. The varying state branching laws govern activities of national banks *only* if they meet the uniform test of branching in section 36(f).

The Comptroller further argues that Congress must have intended section 36(f) to be an "exclusive" definition of a branch because it did not expressly incorporate state branching laws therein.[37] Similar arguments have been rejected by this Court as well as the Court of Appeals for the District of Columbia.

In *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967), the question was what, for purposes of the National Bank Act,

37. The Court of Appeals' construction of section 36(f) is in no way inconsistent with decisions from other circuits. The question of whether that section is a partial or an exclusive definition of a "branch" was not raised or ruled upon in the cases relied on by plaintiffs as conflicting with the decision of the Fifth Circuit here.

is a "state bank" as defined in 12 U.S.C. §36(h). The District Court held there that "only the construction of a federal statute is at issue." The Court of Appeals reversed. It held that, even though section 36(h) did not expressly adopt state law, it is part of a federal statute reflecting a policy of coordination of state and federal law. The Court concluded that "it would be unsound to assert that the proper interpretation of section 36(h) is independent of state policy and legislation." *Id.* at 705.

Similarly, in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), the Comptroller of the Currency argued that section 36(c)(2) [dealing with branching beyond city limits] expressly incorporated state branching restrictions whereas section 36(c)(1) [dealing with branching inside city limits] did not. This allegedly showed a Congressional intent that state branching restrictions did not bind national banks under section 36(c)(1).

The Supreme Court held, however, that the restriction, regardless of how it was designated, was an integral part of state branching policy absorbed under section 36(c). In so holding, the Court observed that it "is a strange argument that permits one to pick and choose what portion of the law binds him." 385 U.S. at 261. Therefore, the Comptroller's argument was rejected in *Walker Bank* for reasons equally applicable herein.

2. *The Court of Appeals correctly found that the off-premises banking activities of First National constitute branching as defined in section 36(f).*

In the instant case, the Court of Appeals determined that First National is receiving deposits and/or cashing checks, within the meaning of section 36(f), at agencies or places of business away from its main banking house. It held, contrary to the District Court, that the contracts of

First National could not be used to avoid the effect of section 36.

Plaintiffs assert that the Court of Appeals made no inquiry as to whether First National was branching as defined in section 36(f) but instead relied entirely upon state law[38] (C.B. 7-8). The Comptroller quotes the Court as holding "indefensible" any inquiry as to whether First National's off-premises banking operations fall within section 36(f), relying instead solely on state law (C.B. 7-8). However, the Court did not term this inquiry as indefensible, but rather plaintiffs' contention that First National was not branch banking within the terms of section 36(f) because of its "agency" and "deposits" agreements (A. 400). Characterizing these contracts as "paper evasions," the Court of Appeals refused to "aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language." (A. 406-07).

The Court of Appeals concluded that the question of whether First National is receiving deposits and/or cashing checks off-premises is to be resolved in terms of banking function (A. 404-05). Finding that the off-premises banking activities of First National met the federal test of branching, the Court then turned to a consideration of the pertinent Florida statute.

3. *The Court of Appeals correctly held that Florida law prohibits the off-premises banking operations of First National.*

Under Florida Statute Section 659.06, all the business of a bank is required to be performed at its banking house

38. Plaintiff national bank goes even further, asserting that the Court of Appeals left intact the District Court's finding that First National was not receiving deposits or cashing checks at its off-premises banking operations (B.B. 6, 25).

and authorized drive-in or walk-up facilities. A bank with drive-in or walk-up facility is authorized only if it is located on the same property as the main banking house or on property contiguous thereto. FLA. STAT. §659.06(2). Thus, the State of Florida has the clearest kind of branch banking statute. It simply provides there can be no branch banking.

The Comptroller asserts, however, that Florida Statute Section 659.06 is "unclear." (C.B. 8). He contends that the Court of Appeals therefore arbitrarily adopted the ruling of defendant Comptroller of the State of Florida that First National's off-premises activities are prohibited under this statute.

Contrary to the Comptroller's assertion, the Court of Appeals specifically examined the statutory language in question and made its own interpretation thereof (A. 408-09). The Court concluded that the statute was "uncomplicated, unhedged, and unmodified." (A. 408-09).

Furthermore, the Court did not accept as dispositive the ruling of defendant state comptroller. The Court merely observed that it should follow such a ruling "when, as here, it appears consistent with the policy of the state statutes." (A. 408).

Thus, federal courts can always protect national banks against arbitrary or unjustified branch banking rulings of state banking officials by evaluating the state law in question, just as the Court of Appeals did in this case.

The Comptroller also attacks the finding of the Court of Appeals that the off-premises banking activities of First National violate Florida Statute Section 659.06. It is first asserted that the phrase "one place of doing business" is subject to a variety of interpretations (C.B. 36). Regardless of whether or not this is true, it is irrelevant in this

case. Both the Comptroller and plaintiff national bank have admitted at all times herein that the off-premises activities of First National constitute the business of banking (A. 20, 160-61, 184).

It is further contended that there is a "critical ambiguity" built into subsection (2) of Florida Statutes 659.06, prohibiting the operation of off-premises drive-in or walk-up facilities. The Comptroller asserts that Florida law only prohibits those off-premises drive-in or walk-up facilities that provide tellers to serve customers, and that there is an unresolved question of fact in this case as to whether First National provides such a "teller" to serve customers at its off-premises facilities.

The Comptroller misconceives Florida law. Under section 659.06(2), banks are permitted to maintain drive-in or walk-up facilities, which may or may not provide tellers to serve customers, if the facilities are located on the bank property or contiguous thereto. Under this section, both state and national banks have for years provided *unattended* night depositories. However, "any drive-in or walk-up facility" that is not so located is prohibited. Further, the point is immaterial in this case because First National does in fact provide a teller on the armored car to serve customers off-premises (A. 57, 384, 389).

One last point must be mentioned in this connection. Defendants believe that the Court of Appeals properly held that the off-premises banking operations of First National are performed in direct contravention of Florida Statute Section 659.06. However, for purposes of the federal branch banking act, it is irrelevant whether the branching activities of First National *violate* Florida law. Under section 36(c), the pertinent factor is whether the branching activities are *authorized* by state law. It has never

been suggested in this cause that the off-premises banking activities of First National are authorized under Florida law.

B. If the Judgment Rendered by the Court of Appeals for Defendants Is Not Sustained, Remand of This Cause Is Required in Order to Resolve Material Issues of Fact.

Plaintiffs' complaints (A. 15-24, 152-61) and defendants' answers thereto (A. 28-47) essentially presented the following issues:

(1) Whether the armored car and depository operations of First National constitute branch banking in violation of 12 U.S.C. §36;

(2) Whether these operations constitute the transaction of banking business at more than one location in violation of 12 U.S.C. §81;

(3) Whether such operations are authorized as incidental powers of national banks under 12 U.S.C. §24 (seventh) so that federal law is paramount over Florida law; and

(4) Whether the operations are performed by First National in violation of Florida Statute Section 659.06.

The Court of Appeals overruled at least three holdings of the District Court as to these issues. Contrary to the District Court, the Court of Appeals held that section 36(f) was not an exclusive definition of a branch and that the off-premises banking activities of First National constitute branch banking within the meaning of section 36(f). It also overruled the District Court's holding that First National's off-premises banking operations do not violate Florida law. The question of whether First National's armored bank car and shopping center depository opera-

tions are authorized incidental powers of national banks under section 24 (seventh) was never passed upon by either court (A. 376).

The holdings of both the District Court and the Circuit Court turned on rulings on law rather than findings of fact. The Court of Appeals noted the factual disputes herein but held that they were not relevant "in light of our decision." (A. 396, fn. 4). Similarly, the Court of Appeals never reached the "section 24" issue because it found the activities in question to be illegal branch banking. Thus, both courts declined, in different ways, to resolve the factual disputes present in this case.

As previously noted, the judgment below for the defendants can be sustained if the Court finds, as did the Court of Appeals, that First National cannot use contractual devices to evade and frustrate the federal branching laws. This is true regardless of whether the language of the decision below is clarified or modified. On the other hand, final judgment cannot be entered here for plaintiffs because there are material issues of fact that would have to first be resolved.

For instance, the District Court held that the "deposit" and "agency" contracts of First National were "unambiguous." It therefore refused to consider parol evidence on matters such as the contractual intent of First National and its customers and, particularly, whether the contracts were intended to evade federal branching law. Issues of fact were created and error assigned. The Court of Appeals should pass on this matter.

Again, the District Court found, from a sampling of five or so bank customers, that First National's off-premises banking operations are performed in "substantial" compliance with the Comptroller's rulings. Yet there were

disputes of fact as to the method by which the off-premises banking operations were actually performed. Further, the District Court's own finding that First National was at times cashing checks for customers off-premises was at least enough to create a question of fact as to whether the activity "substantially" complies with the Comptroller's rulings.

Finally, even if the off-premises activities are not branch banking, a question still remains under the pleadings in this case as to whether such activities are authorized to national banks as implied powers granted under 12 U.S.C. §24 (seventh). This point turns on the question of whether such activities are "necessary" to properly carry out the express powers of national banks. In order to dispose of this case in favor of plaintiffs, this issue must be resolved.

C. The Holding of the Court of Appeals That Section 36(f) Provides the Initial Determination of What Is a Branch, Thereby Establishing the Point at Which State Branching Law Comes into Play, Constitutes a Workable and Practical Rule Which Is Consistent with the Policy of the McFadden Act.

The Court of Appeals properly held that section 36(f) provides the broad, functional definition of a branch which determines if state branching law should come into play. This test is consistent with the legislative history and statutory language of the federal branching act. Thus, it presents a rule of mutual respect and accommodation between state and federal banking authorities while also providing a test of branching to be applied uniformly to all national banks throughout the country.

The test followed by the Court of Appeals precludes arbitrary state action in connection with off-premises ac-

tivities of national banks. Under this approach, the federal courts have the final say as to whether a particular activity is a "branch" within the terms of section 36(f). If it is recognized, whether by state and federal banking authorities or by state and federal courts, that the *initial* test of a branch of national banks is whether the activity falls within the terms of section 36(f), none of the potential consequences suggested by plaintiffs can follow.

That the states do not in fact seek the power to arbitrarily prohibit "all" off-premises banking operations of national banks is clearly indicated. The instant case involves only those particular banking functions that are designated in the McFadden Act as branch banking. Similarly, not one instance has been established where a state has treated any off-premises operation *other than one involving the receipt of deposits, the cashing of checks, or the making of loans* as a branch. Yet an amici curiae brief of twenty-two national banks, doing business in seventeen different states, as well as the brief of the Comptroller of the Currency of the United States, has been filed here.

Further, the prediction that states will prohibit arbitrarily "all" off-premises activities of national banks as "branches" ignores the fact that *such activities would be equally prohibited to state banks.* Consequently, national banks need not fear unfriendly or discriminatory treatment at the hands of states.

On the other hand, if the Congressional policy of competitive equality in branch banking is to have any significance or import, there must also be concern with arbitrary rulings by the Comptroller of the Currency that confer the competitive advantage upon national banks. This must be of particular concern when the ruling in question is

made by a Comptroller of the Currency who candidly states his disagreement with Congressional branching policy.[39] Recognition of section 36(f) as a broad, functional definition of a "branch" provides the requisite protection in this connection, whereas the fixed, technical definition urged by the Comptroller could only cause erosion of the principle of competitive equality.

The instant case presents a situation of arbitrary action by the national Comptroller, not by the State of Florida. The Comptroller of the Currency has permitted national banks to perform branching activities by contractual device and artifice, even though state law prohibits branch banking by state banks. If national banks can use such subterfuges to evade branching prohibitions of the states, the entire federal branching act and policy is frustrated and negated.

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39. In 1963, Comptroller Saxon declared that "the branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual States find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers & the Dual Banking System*, 101 COMPT. CURRENCY ANN. REP. 316, 318 (1963). In this same year, Comptroller Saxon ruled that off-premises banking operations such as those performed here did not constitute branch banking.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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FILE COPY

Nos. 19 and 34.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

THE FIRST NATIONAL BANK IN PLANT CITY,
Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

WILLIAM B. CAMP,
Comptroller of the Currency,
Petitioner,

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

REPLY BRIEF FOR PETITIONER

The First National Bank in Plant City.

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REPLY BRIEF FOR PETITIONER

The First National Bank in Plant City.

The purpose of this reply brief is to correct an important misstatement of fact and to respond to several arguments raised in the brief of respondents, Fred O. Dickinson, et al.

I. Respondents premise much of their argument on the factual base that the messenger pick-up and delivery service at issue in this case is "essentially the same" as the "teller window" operation conducted by some banks prior to passage of the McFadden Act in 1927 (Brief, p. 17). This premise is essential to respondents' argument that it is immaterial whether deposits are actually received, checks paid or money lent (within the meaning of 12 U. S. C. 36 (f)) by First National's messenger since the messenger operation nevertheless constitutes "the heart of banking" (Brief, p. 24) and is, in fact, precisely the evil which Congress sought to legislate against in 1927.[1]

The legislative history of the 1927 Act, which extends back to 1924, totally belies this assumption. In all the lengthy legislative debates and hearings on the subject of the nature and effect of branch banking, virtually no reference can be found relating to the kind of convenience functions customarily performed off-premises by agents or employees of a bank before and since the 1927 legislation. The difference between those two categories of off-premises operations had been described by the Attorney General of the United States as the "vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business," 29 Ops. Atty. Gen. 81, 87 (1911).

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[1] The Government's briefs herein amply demonstrate that the 1927 legislation was intended to **expand** the powers of national banks, not to limit them. Additional acknowledgment of this attitude appears in the volume *Banking Studies* prepared in 1941 by members of the staff of the Federal Reserve Board. The paper dealing with the McFadden Act, written by Walter Wyatt, then General Counsel of the Board observes that:

> "Repeated efforts were made to put national banks on a basis of competitive equality with state banks by increasing their powers and by subjecting state member banks to some of the restrictions applicable to national banks . . ." (p. 50).

On the contrary the debates focused exclusively on two kinds of acknowledged branches then in operation. State banks in at least 18 states were at the time permitted to operate full service branches in the sense that such branches are known today, 67 Cong. Rec. 2833-2837 (1926). In addition, by administrative ruling, the Comptroller of the Currency had authorized national banks to establish "additional offices" or "teller windows." These "teller windows" were somewhat more limited in their permitted functions than were the full service branches. They were, however, specifically authorized by the Comptroller's regulation to receive deposits and pay checks[2] in addition to their various other functions.

"Teller windows" were not established in great numbers throughout the country but they did flourish in New York City and it is their manifestation there which was repeatedly alluded to by the legislators debating the proproposed McFadden Act. Indeed, two of the New York City Congressmen described them in terms which make dramatically clear how different they were in concept and operation from the messenger service conducted by the First National Bank in Plant City. Congressman LaGuardia described them as follows:

> "Year after year the number of teller windows are increased in the cities. They are not teller windows in any sense of the word. They are real complete banking establishments . . . Monumental buildings, with a vice president in charge, with complete banking departments are instituted under the guise of teller windows." 67 Cong. Rec. 3230 (1926).

Another colloquy on the floor of the House among several members including Messrs. Celler and O'Connell of

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[2] Regulations of the Comptroller of the Currency relating to establishment of additional offices by national banks, ¶ 7, October 26, 1926, reproduced in Collins, *The Branch Banking Question*, App. B (1926).

New York further illustrated the real nature of "teller windows".

> Mr. Celler: We have, for example, the Public National Bank in New York that has established 19 "teller windows." They call them teller windows, but they are large monumental establishments costing fortunes to build . . .
>
> Mr. Wainwright: Are those teller windows in effect branches?
>
> Mr. Celler: Absolutely, in effect they are branches where they receive deposits and lend money, discount, and do an actual banking business. They make no bones of it . . .
>
> Mr. O'Connell of New York: They are separate establishments?
>
> Mr. Celler: Yes.
>
> Mr. Stevenson: If the gentleman will bear with me, I will show where we stop that very thing under this proposed act. Under this bill any place is a branch where checks are received, deposits are received, or money loaned. 67 Cong. Rec. 2860 (1926).

Respondents' statement that "(t)he off-premises banking operations involved here are essentially the same as the teller windows" (Brief, p. 17, n. 16) is, therefore, simply not true. The "teller windows" were specifically authorized to perform many essential banking functions such as receiving deposits and paying checks and, in fact, did so in large banking offices under the supervision of high-ranking bank officers. On the other hand, the service authorized by the Comptroller's ruling and actually performed by First National is specifically prohibited from incorporating the functions of receipt of deposits, payment of checks and extension of credit, the functions which are the real "heart of banking." The services rendered by First National's messenger pursuant to Rule 7490 are

plainly in the category of incidental agency activities traditionally authorized to national banks off-premises.

To understand just how different the operation of First National's messenger and receptacle services are from "teller window" or full-service branch operations in concept and practice, as well as in form, it is important to take note of a number of facts established in the record below.

The messenger truck is no more than a standard armored car (App. 131) with design features customary on cars made by the same manufacturer (App. 86). The window and sliding drawer on the side of the truck have never been used (App. 58, 134), are not intended to be used (App. 87) and, indeed, are currently inoperable (App. 87). The truck was purchased by the Bank, at least in part, because the cost of independent armored car transport service in the Plant City area was prohibitive to small retailers (App. 80). First National has, from the beginning, contemplated making a separate charge to its customers for providing the delivery service (App. 103) and the customers have been so advised (App. 68). The truck is not regularly, or even periodically, manned by an officer of the Bank (App. 65). The functions which the messenger riding on the truck is authorized to perform are very strictly limited to the ministerial ones of physically receiving from the customers bags or envelopes to be transported to the Bank for deposit, and handing to the customer cash which has previously been withdrawn from his account (App. 53 et seq.). The truck never carries any currency other than that which has been previously ordered by a customer and debited to his account at the Bank (App. 100-101). No bonds are serviced or travelers checks sold by the messenger (App. 110). Loan payments are not received by the messenger nor is he authorized to receive them (App. 59, 98). Cash or cash items brought

back to the Bank by the messenger are not considered to have been received until the transmittal slip which must accompany them has been validated by a teller other than the messenger (App. 53, 58) and the transmittal envelope opened, and its contents counted and verified at the Bank (App. 95). Similarly, before cash can be sent to a customer by way of the truck, the Assistant Cashier at the banking house who knows the account in question must approve the preparation of a charge slip to the account (App. 54). The only other functions, besides the pick-up and delivery of funds, which the truck has performed are the bi-weekly delivery of cash letters to one of the respondent banks (App. 64) and the delivery of strawberries to friends of the Bank in St. Petersburg and Tampa (App. 69). There has been no discussion of extending the services now performed by means of the armored car and receptacle operations (App. 71).

From the preceding evidentiary description of First National's operations, it is obvious that they bear no resemblance either to branch offices at which "vital" or "life-blood" banking functions are performed or to so-called "teller windows." Respondents' argument that the contractual arrangement between the Bank and its customers is just a subterfuge to cloak important off-premises banking functions is thus exposed as merely argument without factual substance.

II. Respondents have conceded that 12 U. S. C. 36 (f) contains the "broad, functional test of a branch" (Brief, p. 10).[3] It follows that in order to classify First National's messenger and receptacle operations as a "branch" it must be shown either that these operations involve the

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[3] Respondents concede this point even though the Court of Appeals reached a different conclusion and the amicus National Association of Supervisors of State Banks supports the Circuit Court's view.

§ 36 (f) functions or that, for some reason, the federal definition does not apply to this situation.

Respondents argue that First National's messenger is receiving deposits off-premises inasmuch as, through him, the Bank effects "receipt and control of money" (Brief, p. 24). The cases cited in First National's main brief (pp. 25-27), however, demonstrate that the mere receipt of money by a bank employee or even a bank officer does not constitute the receipt of deposits unless the parties so intend.[4] That First National and its customers do not so intend is clear from the contracts they enter into. Respondents concede that "(d)eposits are clearly a matter of contract" (Brief, p. 28).

Indeed, the Supreme Court of Florida has recently rejected the argument that receipt and physical control of money by an agent of a financial institution constitutes receipt of a deposit. The Court found that Florida Statute 659, the general banking statute, of which the section on which respondents base their case is a part,

> "rather definitely reveals a legislative intent to deal with deposits in the orthodox banking connotation as the placing of money in the hands of a financial institution for safe-keeping with a resultant creation of a

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[4] It has long been recognized that the use of agents to collect money off-premises for deposit does not constitute branching. Thus more than fifty years ago the Supreme Court of Kentucky referred to the "wide difference" between the two activities:

> "There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking and the right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it." *Bruner v. Citizens Bank of Shelbyville*, 134 Ky. 283, 298, quoted at 29 *Ops. Atty. Gen.* 90 (1911).

> debtor-creditor relationship." *Greater Miami Financial Corporation v. Fred O. Dickinson, Jr.*, 214 So. 2d 874 (1968).

In ruling against the Florida Comptroller's contention that the activities of a "savings account broker," who collected funds in Florida for deposit with an out-of-state savings and loan association, constituted the receipt of deposits in violation of § 659, th Court continued:

> "Additionally, the placing of money with appellant by its customers is not a deposit within the contemplation of the *Banking Code,* of which Chapter 659 is a part. In the sense used in the Code a deposit creates evidence of an obligation to pay money to the depositor by the depositary . . . When a customer delivers money or a check to the broker for forwarding to the non-resident savings and loan association no creditor-debtor relationship is established . . . The broker acts merely as the transient custodian of the funds for the sole and only purpose of sending them on to the intended out-of-state depositary." (ibid.)

In addition, at page 32 of their Brief Respondents assert that "the Federal Branching Act deals with practical matters of control and disposition of money". The statement is baseless. Neither the language nor the legislative history of the Act make any such statement. In the sense that respondents use the word "control", a Brink's messenger or a postman would be engaging in branch banking. It is absurd to argue that such activities were on the minds of the framers of the McFadden Act.

Respondents' additional argument that the Bank is not in an agency relationship with those customers using the messenger service prior to receipt of the funds at the banking house is not persuasive, and in any event is immaterial to the issues in this case. Respondents' cases deal

with verbal arrangements which courts have found to be overcome by conflicting factual evidence. Here the Bank and its customers by written contract agree that the Bank transports the funds "as messenger and agent for" its customers (App. 123). Nor do the characteristics of First National's messenger service conflict with an agency relationship. Insofar as the funds being transported are concerned, the messenger acts for the benefit of the customer in accordance with the Comprehensive Dual Control Contract entered into by the customer. There is no conceptual difference between the Bank's limited agency function here and its role in a managing agency account through its Trust Department or as escrow agent in connection with real estate loans.

Respondents cannot and do not argue that the contracts between First National and its customers do not mean what they say. Instead, they are reduced to arguing repeatedly that the position of First National and the Comptroller of the Currency is a "subterfuge" and based on "legalisms" or "legal technicalities". This is a strange argument. It is clear that none of the essential banking functions which normally distinguish a branch office operation is performed by First National's messenger either on its truck or at the receptacle. The fact that the pick-up and delivery of funds are related to the basic deposit function does not equate them with that function any more than does the visit of a bank officer to a new business seeking its deposit account.

What First National has done by the contractual arrangements it has entered into with its customers is simply to assure that the customers understand that only the ministerial function of transport is being provided in order that no misunderstandings may arise, as to the status of the funds being transported. As such, the contracts clearly do serve a "legitimate business purpose" in defining the

relationship between the parties.[5] To the extent that "legalistic" language is used in these contracts, it is essential and customary in establishing the point at which the deposit liability relationship arises.

In the 1962 case of *Camden Trust Co. v. Gidney*, 301 F. 2d 521 (D. C. Cir.), cert. den. 369 U. S. 886 (1962) the argument was made that a new "affiliate" of a national bank was in reality a branch because it had many of the characteristics of a branch. The Court rejected this contention finding that the affiliate operation was created pursuant to other "legitimate objects contemplated by the Act" (301 F. 2d 524) and was distinguishable in certain essential respects from a branch. The same answer to the "subterfuge" argument is applicable here. The fact that a different method of operation might in-

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[5] Indicative of the need to define the precise nature of the relationship of the customer and the bank is respondents' suggestion (Brief, pp. 19-20) that the funds transported may be "special deposits". A special deposit is defined as a deposit for safekeeping.

> "It is the placing of money, bonds, notes, or other property of high value and small dimensions, such as a violin, in the custody of the bank, with the duty to return the specific thing deposited. It is to be kept in the same form, and is not to be commingled with the general assets of the bank." 5 Zollman, *Banks and Banking*, 77-81 (1936); accord: *Parker State Bank v. Pennington*, 9 F. 2d 966 (8th Cir., 1925).

If a special deposit were indeed created by First National's action in picking up funds from its customers it would be incumbent upon the Bank to return the actual currency or cash items picked up. Obviously, no such result is intended here. It is to avoid such misunderstandings that courts have regularly held that a special deposit is created only by the express or implied agreement of the parties that the deposit "shall remain segregated from the general funds of the bank". *Busher v. Fulton*, 191 N. E. 752; accord: *Keyes v. Paducah & I. R. Co.*, 61 F. 2d 611 (6th Cir., 1932). The absence of such an agreement creates a strong presumption that no special deposits were intended. *Thompson v. Beitia*, 69 F. 2d 356 (9th Cir., 1934). Furthermore, the deposit contracts make clear that no deposit relationships of any kind, either special or general, are created until the funds transported by First National's messenger are received at the banking house. Prior to that time the Bank holds the funds in an agency capacity, a form of bailment.

volve the actual receipt of deposits does not render it a subterfuge to choose a method which does not.

CONCLUSION.

Issues of great importance to the national banking system as a whole are presented by the decision of the Court of Appeals in this case. It is significant, however, that the case arises out of the attempt by a small bank in a small community to provide a convenience service to its customers spread through the town and surrounding rural areas. The effect of the Court of Appeals' decision, in Florida at least, will be to prohibit such small national banks from performing any service[6] off-premises no matter how far removed from the essential banking functions which were so obviously on the minds of the framers of the McFadden Act. Such a result serves no purpose other than the continuation of restraints on banking competition and expanded customer service.

Respectfully submitted,

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[6] The Court below observed that even "minimal" services off-premises are forbidden by the state's law. This interpretation of Florida statute 659.06 is dubious. However, in view of the Court's deference to the State Comptroller's similar construction of the statute no forum for rebuttal is realistically available to petitioner.

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364-896—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 19

THE FIRST NATIONAL BANK IN PLANT CITY, PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE COMPTROLLER OF THE CURRENCY

Because our opponents[1] disagree both as to what the issues in this case are and as to the resolution of what we deem the fundamental issue, a brief reply

[1] The respondents (the Florida Commissioner and three state banks that compete with the petitioner national bank) and the amicus curiae National Association of State Bank Supervisors have elaborated in detail their differing arguments in favor of

may help to restore the case to its proper focus. In addition, we shall correct certain errors in the opposing briefs and answer some points with which we did not deal specifically in our opening brief. We do not, of course, present here our answers to each of the contentions that the various opposing briefs have mustered in response to our opening brief.

1. In an effort to avoid the fundamental issue raised by the decision below, the respondents accept our position that federal law provides the definition of "branch" for purposes of Section 36(c) (Br. pp. 41, 44) and rest their case upon the proposition that the activities of the petitioner bank amount to branching as a matter of federal law. Significant as it is, this concession—which is in direct opposition to the position of the *amicus* National Association of State Bank Supervisors (NASSB)—does not remove the choice of law issue from the case. Acceptance of the concession would, we believe, facilitate a ready disposition of the case in the petitioners' favor, but it would leave unexamined the fundamental proposition for which the decision below stands both on its face and in the eyes of other courts and the state banking commissioners.[2] That proposition—that state law governs the very threshold determination whether par-

affirming the result below. The other *amici curiae* favoring affirmance (Independent Bankers Association, *et al.*; The First National Bank of Gainesville, *et al.*; and the States of Georgia and North Carolina) take positions that are in substance the same as those taken in the brief for the respondents. This reply brief refers directly only to the brief for the respondents and to that for the state bank supervisors.

[2] NASSB Br. p. 11; see generally Brief for First National Bank of Cornelia, *et al.* as *amici curiae*.

ticular national bank activities are subject to state limitations—is erroneous and dangerous for the dual banking system established by Congress and this Court should pass upon it.

The respondents' approach to the case involves a distortion of the court of appeals' decision, accompanied by misquotations and quotations out of context. In order to show this, it is enough to quote the court's own express statements of the issue and of its holding:

> The controlling issue of law in this appeal concerns the district court's choice of law, i.e., that court's failure to consult state law in determining whether First National's activities outside its main offices constitute "branch banking. * * *" [A. 396–397]
>
> * * * * *
>
> * * * First National attempts to convince us that Section 36(f) of the National Banking Act is * * * the sole and monolithic definer of "branch." Then, by taking us through some labyrinthian and meandering paths of the laws of agency and contract, First National seeks to demonstrate that it has not established offices or agencies, where, as specified in Section 36(f), "deposits are received, or checks paid, or money lent." Such a line of argument * * * is indefensible. [A. 400]
>
> * * * * *
>
> * * * We therefore refuse to tread the twisting paths of agency and contracts urged upon us in this case and look instead to the laws of Florida. [A. 408]

The fact that the court stated that it "subscribed" to a somewhat confusing district court opinion in

another case[3] obviously cannot detract from its own statement of what it was deciding. And the respondents' claim that the decision below is based upon a "finding that the off-premises banking activities met the federal test of branching" is disproved by the complete absence from the opinion of any discussion of the facts of the case in terms of the language of the federal definition set forth in Section 36(f).

For the reasons we have stated in our opening brief, we urge this Court to endorse the district court's treatment of the threshold question of definition as a question solely of federal law. Since the district court then concluded that the bank activities in question were not branching under Section 36(f), it properly found Section 36(c), and therefore Florida law, wholly irrelevant to their legality. Although the court of appeals did not have occasion to review this application of the federal standard, we have, however, suggested that it would be appropriate for this Court to do so and to terminate the litigation by reinstating the district court's judgment in favor of the national bank and the Comptroller.[4]

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[3] *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash.), quoted in part in the court of appeals' opinion at A. 401–406. We discuss Judge Lindberg's opinion at some length in our opening brief at pp. 6–8.

[4] We disagree with the respondents' contention at pages 50–52 of their brief that the Court would in any event have to remand the cause for a determination whether the activities in question lie within a national bank's incidental powers under 12 U.S.C. 24 Seventh, and for consideration of evidence relating to the bank's actual compliance with the Comptroller's regulations on messenger service. The district court's final judg-

2. The state banking supervisors understandably disagree with the respondents on the choice of law question, which they view as the "essential question herein" (NASSB Br. p. 10). Their primary concern is of course with the general extent of their power over national banks, and they acknowledge that their aim is to "plac[e] state branch statutes in a position of dominance in the matter of branching" (NASSB Br. p. 11). To this end, they devote their brief largely to advancing an interpretation of Section 36(f) intended to correct the failure of the court below to give any explanation for its presence in the statutory scheme while preserving the conclusion that state notions of what is branching govern. Their rationalizations do not, however, withstand analysis.

The state supervisors seize upon the word "includes" in subsection (f); they argue that since the federal definition says that the term "branch" "*includes*" the enumerated activities rather than that it "*means*" those activities, it must follow that some

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ment properly held that resolution of any question under Section 24 Seventh was "not appropriate or necessary" (A. 376); the question whether the Comptroller has properly ruled that such messenger service is a permissible exercise of a national bank's incidental powers is wholly unrelated to the issues of this case and no declaration on that subject was sought by the national bank or the Comptroller. And the district court properly concluded that the issues before it were limited to "the propriety of the Comptroller's rulings and the procedures which First National has set up to put the rulings into effect" (A. 373), thus rendering it unnecessary for the court "to consider every transaction that has taken place since the messenger service was inaugurated * * *" (A. 374).

other activities can also be enough to constitute a branch. Then, with the support of nothing more than the invocation of a putative overriding policy of "competitive equality", they conclude that the determination of what other activities might constitute a branch for purposes of the federal law must be made not as a matter of federal law by the federal regulatory agency or by the federal courts but by state officials and state courts applying state branching policy. They purport to give Section 36(f) a meaning by saying that it is intended simply to eliminate any doubt that the enumerated activities should be treated as branching. (NASSB Br. pp. 28–29.)

This effort to rationalize Section 36(f) out of existence is no more effective than the court of appeals' approach of ignoring it. First, the NASSB's reasoning unjustifiably assumes that use of the word "includes" is inconsistent with a legislative intent to establish an exclusive definition. But this Court has recognized "that the term 'includes' may sometimes be taken as synonymous with 'means'" and that it must be read in the light of the pertinent statutory context and legislative history.[5] Our opening brief shows

[5] *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125. See *Minnesota* v. *Probate Court*, 309 U.S. 270, 273–274; *Surowitz* v. *City of Pontiac*, 374 Mich. 597, 604, 132 N.W. 2d 628, 632; and *Schauf* v. *City of New York*, 23 Misc. 2d 585, 587, 198 N.Y.S. 2d 435, 438. In *Blankenship* v. *Western Union Tel. Co.*, 161 F. 2d 168, 169 (C.A. 4), a case strikingly similar to the instant one, the phrase, "'[e]mployee' includes any individual * * *," as used in a definitional subsection of the Fair Labor Standards Act, 29

(pp. 23–32) that the statutory scheme requires Section 36(f) to be treated as a federal definition and that Congress so intended; the NASSB has pointed to no legislative history indicating a congressional intent that the federal definition be "supplemented" by varying state definitions, and we are aware of none. Second, we have shown (pp. 15–23) that there is no overriding abstract principle of "competitive equality." And, finally, the NASSB's rationalization of subsection (f) would make it a superfluity just as surely as would the court of appeals' blindfold: Defining the enumerated activities as branching is meaningful under subsection (c) only if they also constitute unauthorized branching under the pertinent state substantive law; but if the state so regards them they would, under the NASSB formulation, be branching for purposes of subsection (c)'s reference to state law even without regard to the enumeration.

3. The respondents and the NASSB seriously distort the Comptroller's position as to the meaning and application of the federal definition of "branch" established by Section 36(f). It is not the Comptroller's position, as they contend, that "anything less than an off-premise office conducting a full banking business" is not a branch under the Section 36(f) definition (NASSB Br. p. 31; Respondents' Br. pp. 15–16, 38–39). This distortion is based upon a misapplication of our argument on the choice of law question (where we

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U.S.C. 203(e), was held by the court to constitute an exclusive definition. The court based this determination upon the conference committee report's statement that, " 'Employee' is *defined* as any *individual* * * *."

show that Congress intended to establish a federal definition and to make it exclusive) as an argument on the wholly separate question of the meaning of the terms of the definition that Congress in fact enacted.

We do not dispute that Section 36(f) defines "branch" in the disjunctive: An activity is branching if it amounts to the receipts of deposits *or* the payment of checks *or* the lending of money. And we agree that the presence or absence of any of these functions must be determined not on the basis of hypertechnical legal fictions but rather in the light of normal banking usages and the practicalities of the banking business. We recognize, and indeed emphasize, that subsection (f) uses broad and somewhat vague terms that establish only a general framework for determining whether one of these critical "lifeblood functions" of branching is present. But we do contend that the filling in of the gaps in the definition and its application to particular situations are committed in the first instance to the Comptroller of the Currency as administrator of national banks, subject only to judicial review in the federal courts. And, as we have argued in our opening brief (pp. 42–43), the Comptroller's expert interpretation of the Act with whose administration he is charged is entitled to controlling weight unless it is demonstrated to be unreasonable.[6]

[6] See, in addition to the cases cited at p. 43, n. 43 of our opening brief, *First-Citizens Bank & Trust Co.* v. *Camp*, 409 F. 2d 1086, 1093–1095 (C.A. 4); *National Association of Securities Dealers* v. *Securities and Exchange Commission*, C.A.D.C. Nos. 20,164 *et al.*, July 1, 1969, sl. op. pp. 4, 47–48.

Certainly it cannot be contended that every off-premise activity related to the banking business is *ipso facto* branching.[7] The question in every case is inevitably one of the nature and extent of the off-premises activities that are being carried on. The legal relationship that a particular activity establishes between the bank and its customer is certainly a major factor in identifying the banking functions involved; the mutual rights and obligations created by a particular banking act are always, to some extent at least, in the minds of the customer and the bank's agent, especially so where—as with the activities involved in this case—the customers are primarily business enterprises. It was thus entirely proper for the Comptroller to give weight to the legal relationships created by the messenger and receptacle services involved in this case. In the absence of any contrary statutory language or other expression of legislative intent,[8] we submit that the district court was correct in af-

[7] See NASSB Br. pp. 35–36. Thus, for example, the respondent Florida Commissioner by letter of July 28, 1969, advised the Broward National Bank of Ft. Lauderdale, Florida, that "the activity by your bank's personnel in selling for cash bank money orders, cashier's checks, travelers' checks or similar instruments for transmission of money, on board ships docked at Port Everglades, is considered permissible under" Section 659.52(1)(a) of the Florida statutes.

[8] The reply brief for the petitioner national bank demonstrates the error of the respondents' contentions that congressional concern with what were then known as "teller windows" during the debates on the original McFadden Act indicates an intent to restrict the much more limited kind of off-premise activity involved here. The bank's reply brief also discusses in factual detail, as does its opening brief, the practical operation of the pick-up and delivery service in question.

firming, as it did, the Comptroller's interpretation.

4. The respondents disparage the Comptroller's authorization of messenger and receptacle services by characterizing it as "absolutely unique" and "contrary to the long-standing administrative practice" of his predecessors (Br. pp. 25–26). The first answer to this argument is that it is irrelevant; administrative discretion is not frozen by the manner in which it has been exercised in years gone by, but must be flexible to meet changing circumstances, as the court of appeals recognized (A. 407). *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 164–171; *American Trucking* v. *Atchison, T. & S.F. R. Co.*, 387 U.S. 397, 416.

The second answer is that there is nothing unique or unprecedented about the Comptroller's contemporary interpretation of Section 36(f) as expressed in paragraph 7490 of his Manual for National Banks. Indeed, a similar interpretation is found in rulings shortly after the enactment of the McFadden Act. In a March 6, 1929, letter to the Frost National Bank, San Antonio, Texas (a nonbranching state), the Comptroller's office stated (A. 186):

> This office is not disposed to encourage the use of armored cars, or any other agency, for the collection or receipt of deposits which under ordinary circumstances should be received at the banking house of a national bank. *In the opinion of counsel, to whom this question has been referred, however, it will be difficult to sustain a general ruling that the use of an armored car for the purpose of collecting a deposit of a bank's customer is illegal.* A bank,

as an incident of its business, uses its runners or agents to collect notes, drafts and bills of exchange for customers or correspondent banks. By analogy it might be claimed that it has the right to send an agent or employee to collect a deposit which a customer desires to make. The purpose for which the armored car is used must, therefore, be considered in each case in determining its legality.

If a bank should undertake to use an armored car as a place of business for opening accounts, receiving deposits, making loans, and in general for conducting the banking business at some place other than at its home office, as you suggest, it might be held by the courts to have been used as a branch bank in which case its use would clearly be ultra vires.

You are correct in stating that it is customary for banks in some places to be equipped with armored cars * * *. [Emphasis added.] [9]

The next thirty years saw a series of letter rulings, some of which we acknowledge are mutually inconsistent; all of these, however—including those cited by the respondents—recognized that the definition of "branch" was a matter of federal law. Finally, in 1963 after several years of intensive study endeavoring "to transform the regulation of National Banks into a responsive and meaningful instrument of public policy * * *" (Comptroller's Manual for National Banks, p. iii), the first formal rulings on the

[9] The record contains similar letter rulings approving bank messenger services dated March 16, 1929 (A. 185–186), July 11, 1941 (A. 187), and May 14, 1954 (A. 188–189).

subject were issued as paragraphs 7490 and 7491[10] of the Comptroller's Manual for National Banks. Thus, rulings of the Comptroller's office contemporaneous with the McFadden Act, and the only formal rulings made after a well-organized and thorough study of the banking system,[11] take the position that national banks may operate messenger services under appropriate circumstances.

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[10] Par. 7490 is the ruling directly involved in this case. Par. 7491 is quite similar in theory and provides:

> Deposit machines. A national bank may utilize at any location a machine which receives checks, currency, or coin for deposit. The machine shall provide documentary evidence of the transaction which states that the transaction will become a deposit upon verification and crediting at the main office or a branch office of the bank. Utilization of such machines at locations other than the main office or a branch office of the bank does not constitute branch banking. A bank may provide insurance protection under its bonding program for transactions involving such machines.

[11] For one aspect of this study, see *National Banks and the Future*, Report of the Advisory Committee on Banking to the Comptroller of the Currency (1962).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief and the briefs for the petitioner national bank, the judgment of the court of appeals should be reversed and the cause remanded with directions to affirm the judgment of the district court.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 19

THE FIRST NATIONAL BANK IN PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

Reply Brief on Behalf of The First National Bank of Cornelia, Georgia, et al. As Amici Curiae In Support of Petitioners

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A number of erroneous points and arguments made in the briefs of respondents and those amici curiae supporting respondents [1] have already been answered

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[1] These briefs will be referred to as follows: Resp (Fred O. Dickinson, Jr., and the three respondent state banks), NASSB (National Association of Supervisors of State Banks), IBAA (Independent Bankers Association of America, et al.), States (the States of Georgia and North Carolina), and Gainesville (The First National Bank of Gainesville, et al.).

either in the opening briefs supporting petitioners or in the reply briefs filed on behalf of the Comptroller of the Currency and the petitioner bank. This reply brief on behalf of twenty-two amici curiae national banks will attempt to avoid repetition and duplication and will either supplement points referred to by others or deal with points not already covered.

I. It is highly significant that the respondents and their supporting amici curiae cannot agree on whether § 36(f) defines a branch, and that respondents have abandoned the view of the court below that state law rather than federal law is determinative in defining branches.[2] Respondents assert that § 36(f) does define a branch and that the definition is thus one of federal law.[3] The independent bankers, on the other hand, feel that while § 36 includes a definition of branching, it is only a "partial definition" and the ultimate test of

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[2] Respondents attempt to align themselves with the Fifth Circuit by stating that "the true holding of the Court of Appeals is that federal law, and not state law, initially controls the question of what activities of national banks are 'branching' for purposes of the federal branch banking statute • • • " (Resp 41). As shown by the Comptroller of the Currency in his reply brief, this is precisely the opposite of what the Court of Appeals actually ruled.

[3] *E.g.*, "Section 36(f) defines a branch • • • " (Resp 11); "Therefore, First National is branch banking within the express terms of the federal definition of a branch" (*id.* at 12); In the McFadden Act the "term 'branch' was defined as including • • • " (*id.* at 15); The McFadden Act "incorporates the definition of a 'branch' set forth in the 1911 opinion of the Attorney General" *(ibid.)*; "Congress expressly defined a branch • • • " (*id.* at 16); "Further, Congress' use of the word 'include' in section 36(f) indicates its intent to provide a broad definition • • • " *(ibid.)*; "The McFadden Act defined a branch • • • " (*id.* at 19); "Representative McFadden consistently stressed that the definition of a branch contained therein defined branching in terms of 'service' " (*id.* at 20).

the particular activity is whether the state bank is allowed to engage in that activity under state law (IBAA 13). The National Association of State Banks takes the position that § 36(f) is not an all-inclusive definition and that the Congressional intent was to "establish state law as the standard for branching under Section 36(c) of the National Bank Act * * *" (NASSB 11). The Georgia and North Carolina banks take no position in regard to the § 36 definition (Gainesville 5-6), and the States of Georgia and North Carolina feel that branching is involved in this case "regardless of which definition of 'branch banking' the Court applies" (States 5). Surely all of this confusion, at the very least, belies the claim that Congress clearly intended state law to be applied, since the principal parties to the case cannot bring themselves to support this view. And if federal law controls, the District Court and petitioners have amply demonstrated that the activities at issue here come outside the definition.

Further in regard to Congressional intent, respondents rely primarily upon a quotation from Representative Celler to bolster their claim that Congress, while enlarging the powers of national banks to perform off-premises operations, did so only to the extent necessary to permit them to compete equally with state banks (Resp 21). What respondents fail to note is that Representative Celler was definitely expressing a minority view, as demonstrated by the following:

In language immediately following that quoted by respondents, Representative Celler explained an amendment he was offering to the McFadden Act. He said:

> If you are going to do the right thing and are going to put all of these banks on a parity, then if

> the Federal Reserve Board lays down certain rules against State member banks, those same rules should be operative against the national banks when they open their branches. That is the purport of my amendment. * * *
>
> Unless you do that I, who am otherwise in favor of this bill in its entirety, will vote against it, because I feel the bill will be so tinctured with wrong and inequality as to vitiate all the other advantage [sic] of the bill. [67 Cong. Rec. 3241 (1926).]

The House *refused* to adopt his amendment, and he then proceeded to vote *against* the Act (67 Cong. Rec. 3303 (1926)). Congressman Celler, therefore, can hardly be relied upon as the definitive authority on the meaning of the Act he voted against.

II. The state bank supervisors argue that "* * * the source of state law is not supervisor imagination, but the statutes of a state reflecting its branching policy" (NASSB 33). Further, the state bank supervisors urge that "unreasonable construction of those statutes can be struck down," and that it is "unwarranted" to suggest that

> state legislatures or Supervisors may embark on a program to prohibit their own banks from such activities as banking by mail or credit cards (a universal practice throughout the country of both state and national banks) in order to somehow hurt national banks * * *. [NASSB 35-36.]

This position simply will not stand analysis in the light of the facts in Florida and other states. The Florida statute involved here provides only that "the business of the bank or trust company shall be transacted at its banking house * * * and not elsewhere." Fla. Stat., § 659.06(1)(a). Commissioner Dickinson

has interpreted this statute to prohibit a bank from operating a delivery service. Yet just last July, the same Commissioner ruled in a letter to another bank that "the activity of your bank's personnel in selling for cash bank money orders, cashier's checks, travellers' checks, or similar instruments for transmission of money, on board ships docked at Port Everglades, is considered permissible * * *," without even mentioning § 659.06(1)(a).[4] There is no guideline in the Florida statutes for either Commissioner Dickinson's armored car ruling or his shipboard sales ruling, and both quite obviously result from "supervisor imagination."

While it is quite typical for bank regulators to be vested with wide discretion, it is clear that Congress intended national banks to be regulated in such matters as involved here by the United States Comptroller and not by the imagination of fifty different state officers. Indeed, even where branches are concedely involved, Congress quite specifically incorporated into § 36(c) only "the statute law of the State in question," thus indicating that state administrative interpretations were not binding upon national banks.[5] Surely, when Congress has limited so expressly the discretion of state bank supervisors concerning activities agreed

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[4] This ruling was made by Commissioner Dickinson in a letter dated July 28, 1969, to the president of the Broward National Bank, Ft. Lauderdale, Florida, concerning Florida Stat. § 659.52(1)(a), which provides that "no person other than bankers shall: (a) solicit or receive deposits * * *."

[5] *Union Savings Bank of Pachogue* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964); *Howell* v. *Citizens First Nat. Bank of Ridgewood*, 385 F.2d 528 (3rd Cir. 1967); *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

to constitute branches, Congress did not intend for supervisor discretion to be used in the first instance in determining whether the branch statutes were to come into play at all. Under the liberal "doing business" test established by the Fifth Circuit, however, "supervisor imagination" can be used to prohibit *any* activity conducted by a national bank outside the four walls of its banking house.

The Court of Appeals employed a gross understatement when it suggested that "national banks may well fear the authority of state comptrollers to make extreme use of this * * * defining process * * *" (App. 407). In Oklahoma, for example, the Banking Board which supervises the state banking commissioner is composed of the commissioner, one citizen having no connection with banking, and three members who "shall be active officers of state banks or trust companies, no one of whom shall be an officer or director of a national bank." 6 Okla. S.A. § 202. This statute is precisely the type of "unfriendly legislation by the States" from which Congress and this Court have consistently immunized national banks. *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 413 (1874). We are not casting doubt on the good faith of any Commissioner when we point out that a state regulator attempting to follow the general intent of a legislature such as that in Oklahoma would naturally tend to restrict the competitive ability of national banks.

The justification for our dual system of state chartered and nationally chartered banks is the room for experiment and competition between the two so that new and better services may be developed for the benefit of the public. During the 1920's the state banking system was in such ascendency that the very ex-

istence of the national banking system was threatened, and Congress enacted the branching provisions of the McFadden Act to enlarge the competitive ability of national banks. Now, however, as amply demonstrated by the briefs filed in this case, the national banking system in many states is the more aggressive in finding new and better banking services. The respondents themselves seem to concede this, for they point out that in this very case, "First National obtained a number of new, large commercial accounts as a direct result of its off-premises services (A. 383). It immediately began to handle 'well over' one million dollars a week through the armored car (R. 55-56)" (Resp 39). It is difficult to see how the armored car service could have garnered this much business in so short a time unless there was a substantial demand for it on the part of the banking public.

The state banks, as mirrored by the state bank respondents here, have chosen not to attempt to meet or better these services to the public, but instead to restrict and hold back the national banking system to whatever noncompetitive level the state banks wish it to be.[6] Thus state banking authorities could and would, under the Court of Appeals decision, issue rulings restricting national banks simply because in many states there is no state bank which wishes to offer whatever expanded services are in question. Such an anticompetitive result is fundamentally inconsistent with the concept of a dual banking system; is not supported anywhere in the legislative history of the McFadden

[6] It is not without significance that the independent bankers note: "A state bank supervisor *normally* would not restrict the normal and necessary administrative functions of a state bank away from its main office merely to hamper national banks" (IBAA 17; emphasis added).

Act or any other statute, and flies in the face of this Court's holding that "* * * the Federal Government has frequently expanded their [national banks'] functions and authority * * *" so that "* * * these federal institutions may be at no disadvantage in competition with state-chartered institutions * * *." *Franklin National Bank* v. *New York,* 347 U.S. 373, 375 (1965). The loss of the ability to take the lead in offering new and better service to customers—which is what the state bank supervisors really suggest—would be a severe "disadvantage in competition."

III. Repeatedly, respondents attempt to persuade the Court that the position they espouse would apply *only* where the bank itself is performing the prohibited function. Unfortunately, this is simply not the case.

Take, for example, the Lectro-Teller, an automated off-premises depository. This machine was demonstrated at banking conventions as early as five years ago, but engineering and service problems kept it from taking hold in the industry. Continued research and improvements finally resulted in a field test in Phoenix by the First National Bank of Arizona. The field test resulted in a contract between First National and the Atlas Engineering and Equipment Company for the placing of fifty machines around the state. The bank retained Atlas to lease, place, service and supply the machines, and to pick up and deliver deposits to the bank. By contract and notice, Atlas acted as an agent for the depositor and not for the bank.[7]

Based on First National's success, Lectro-Tellers began to be sold in other states as well. In some in-

[7] See Peck, "The Checkless Society," Bank Equipment News (April 1967).

stances they were operated by the banks themselves; in others, the manufacturer (Milgo Electronic Corporation of Miami) contracted with armored car companies which in turn contracted with the banks. Despite a favorable ruling by the Comptroller of the Currency,[8] the machines began to face rulings of illegality by state authorities, based on the concept that the machines were branches, *regardless* of whether the bank or another party operated the machines.

Thus, in the Oklahoma case referred to in our main brief (p. 13, n. 8), two national banks entered into written contracts with Oklahoma Armored Car, Inc., and a third bank entered into a similar contract with Armored Express, Inc. In each instance, the armored car companies furnished, operated and serviced the machines. The contracts specifically provided that the armored car companies were the agents of the depositors and not of the banks, and that the armored car companies were solely responsible for deposits until delivered to the banks. Despite these facts, the state Attorney General ruled that the machines were absolutely prohibited as branch banking by Okla. Sess. Laws 1965, Ch. 161, § 501, as amended.[9]

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[8] Comptroller's Manual for National Banks, par. 7491.

[9] In a letter to the Commissioner of Banking of Wisconsin, the state Attorney General has ruled that teller machines are branches. Letter from Attorney General La Follette to Commissioner Heironimus dated October 18, 1968. Yet the machines cannot, as a practical matter, qualify as branches under the Wisconsin code. For example, as the Attorney General pointed out, "* * * the teller machine will have to observe the provisions of sec. 220.29, Wis. Stats., pertaining to legal holidays. On the other hand, one of the attributes of the teller machine, as advanced by the manufacturer, is that it will be in service on such days." *Ibid.* The result is to rule them out of existence in that state.

Similarly, on August 22, 1968, the Attorney General of Texas ruled that off-premises deposit machines violated the state's ban on branch banking. In so doing he made a point of the fact that the ban applied even where the machines remained the property of the vending company which produced them and even where the vending company was the agent of the depositor.[10]

Thus, this Court should not be misled into believing that an adoption of respondents' position would apply only where the bank itself is performing the prohibited service. On the contrary, if allowed to ignore the agent-principal contracts between depositors and banks, state authorities will just as easily ignore the agent-principal contracts between service companies and banks. The Oklahoma and Texas rulings show that this is already being done.

The same point illustrated above by Lectro-Tellers is equally applicable to armored car services. While the instant case happens to involve armored cars owned by the bank, the Florida ban could be applied just as easily if the armored cars were operated by Brink's, Wells Fargo, or the innumerable other ar-

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[10] The Attorney General of Alabama has taken exactly the opposite view. In a letter to Hon. W. M. Monty Collins of the Alabama House of Representatives dated January 29, 1969, Attorney General Gallion wrote as follows:

> This will acknowledge your letter of December 17, 1968, regarding legality of the Lectro-Teller as an off-premises depository, wherein the contract between the bank and Melgo [sic] Electronic Corporation contains a provision that the company is acting as agent for the depositor and not for the bank.
>
> There appears to be no legal impediment to the use of the Lectro-Teller if (1) the operation of these machines is not under the control of the bank, (2) the company is acting as agent for the depositor, and (3) the bank assumes no responsibility whatsoever in connection with said deposits until such deposits have reached the bank.

mored car companies now performing invaluable services throughout the country. The contracts between depositors, armored car companies and banks invariably provide that regardless of who is paying for the service,[11] the armored car companies are agents of the depositors and not of the banks. As evidenced by the Oklahoma and Texas rulings above, however, these contracts are as easily bypassed as those ignored by the Fifth Circuit in the instant case.

The confusion and chaos that would result if independent as well as bank-owned armored car services were brought to a halt staggers the imagination, for these services have become a major factor in banking today.[12] As early as 1958, an Interstate Commerce Commission report showed that about 1,650 armored cars were being operated in the United States; that Brink's Incorporated alone had about 16,000 contracts throughout the United States and Canada, of which about 284 were for interstate movement (commingled with intrastate movements), and that the Armored Carrier Corporation was serving 258 shippers in interstate commerce.[13] Quite obviously, armored car services have greatly expanded in the last eleven years. Even if these services were not entirely eliminated, the impact on interstate movements of widely varying re-

[11] Respondents state that Brink's operates under contracts with bank customers "who pay for the service rendered for them" (Resp 9). This is inaccurate. Often the service is paid for by the bank, not the customer.

[12] The Washington correspondent for Banking Magazine has written that at the time of the *Dickinson* ruling, "11 Florida national banks were considering operating messenger services similar to Plant City's and 4 were actually doing so" (LXI Banking 72 (March 1969)).

[13] Petition of Armored Carrier Corporation, 303 I.C.C. 781, 783, 784 (1958).

quirements and restrictions from state to state would be considerable.[14]

That these services could in fact be eliminated if state authorities were allowed to use their "supervisor imagination" is illustrated by a letter dated April 24, 1969, from Thomas E. Fox, Deputy Attorney General of Tennessee, to M. A. Bryan, state Superintendent of Banks, which is reprinted here in its entirety:

> I have before me your letter of April 24 in which you inquire whether or not an agreement between an Armored Car Services and a local bank for the maintenance of depository for the bank's customers and the transporting of deposits collected therein to the bank would be in violation of § 45-211, Tennessee Code Annotated, which provides, among other things:
>
> "No corporation, firm, or individual shall create and operate any branch bank, office, or agency, for the purpose of receiving deposits, paying checks, making loans, or receiving or discounting bills or notes in any place whatsoever other than the county wherein its principal office is located and its principal banking business is carried on."
>
> You state that the depositor would receive from the machine a deposit slip as agent for the depositor and that such deposit would not be credited to the depositor's account until received by the bank. Further, the depositories would be marked plainly that they are under the exclusive protection and control of the Armored Car Services.

---

[14] Respondents seem to concede as much when they say that "Obviously there must be uniformity as to what off-premises activities of national banks constitute a branch for purposes of this section" (Resp 45). Under the Fifth Circuit view, Lectro-Tellers would be branch banking in Illinois but not in Kentucky, and an armored car service would be branch banking in Georgia but not in California (see our opening brief, pp. 7-12, 16).

> You are advised that it appears to me that the Armored Car Services is either operating a bank for itself for the purpose of receiving deposits or operating a branch for the contracting bank and I'm inclined to think it is the latter.

For respondents to allege, in the light of a letter like this one, that state branching statutes are clear on their face,[15] that state authorities would not rule on the basis of "supervisor imagination," and that the only issue in this case relates to a bank's own operations, is simply unrealistic and obviously erroneous. Moreover, the point is not that to date no "instance has been established where a state has treated any off-premises operation other than one involving the receipt of deposits, the cashing of checks, or the making of loans as a branch" (Resp 53; emphasis deleted). The real point, as the District Court recognized in the *Bank of Cornelia* case, is that *any* off-premises operation could be treated as branch banking under some state statutes (see our opening brief, pp. 9-10). In fact, seven specific activities *not* involving the receipt of deposits, the cashing of checks, or the making of loans were cited in that case, and the court agreed that all could be banned under Georgia law (*ibid.*).

IV. By arguing (incorrectly) that the Comptroller's ruling is new and breaks with tradition, respondents

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[15] The vagueness of these state statutes in relation to off-premises activities is illustrated by a letter to the manufacturer of Lectro-Tellers dated February 5, 1968, from the Bank Commissioner of Oklahoma. The letter stated that "there is a national bank in Tulsa that uses an armored car service, whereby various depositors place their deposits in a vault in a shopping center and the deposits are picked up daily and delivered to one certain bank, but there is *quite some question* as to the legality of this action" (emphasis added).

and the independent bankers imply that the ownership and operation of armored cars by banks is itself a new innovation. Quite the contrary is true. "The automobile is not a new element in the banking field, having been used extensively in England, Germany, Canada and the United States, by bankers, trust companies and safe deposit companies, ever since the motor car reached a perfected state."[16] The first use reported in this country was in 1906:

> A traveling bank, which not only receives deposits but carries money to customers to meet their payroll requirements, is part of the equipment of the Night and Day Bank of New York city.
>
> To make the collections the bank has had built a specially designed automobile. Taking up the greater part of the body of the machine is a large safe, built into the automobile so that it cannot be removed. There are no side doors, entrance only being possible to the section containing the safe by a front door next to the chauffeur's seat. The mechanism is so constructed that it is impossible for any one but a chauffeur who has learned the plan to operate it.[17]

In a 1911 advertisement, the Bellamore Armored Car and Equipment Company, which sold this type of armored car to banks, advertised its uses as follows:

> Amongst the many uses of the
> Bellamore Armored Steel Bank Car
> are the following:
>
> The collection of heavy deposits.
> The delivery of pay-roll money to factories.
> The delivery of large sums of money to customers.

---

[16] 81 Bankers' Magazine 739, 741 (1910).

[17] 71 Bankers' Magazine 1017 (1906).

The transportation of bullion.
The carrying of money and securities between branch institutions.
The collection and delivery of valuables for safe deposit.[18]

Thus, we are dealing in this case with a time-honored practice and one that has come into increasing demand as business has flourished and financial transactions have become more complex. From the largest company whose transactions involve millions to the smallest merchant who is fearful of carrying his cash into town, businessmen have come to rely upon armored cars as an integral and essential part of their daily operations. Only if competitive forces are allowed free play between state and national banks can services such as this one be increasingly made available to the banking public.[19]

V. Finally, we press upon the Court that we see no practical alternative to construing § 36 the way here urged by petitioners. Both respondents and the state bank supervisors recognize that banks perform many

---

[18] 83 Bankers' Magazine 350b (1911). An armored car built for the First Mortgage Guarantee and Trust Company of Philadelphia was described as follows: "Such a car may be used for the collection of heavy deposits, the delivery of pay-roll money to factories, the delivery of large sums of money to customers, the transportation of bullion, the carrying of money and securities between branch institutions and the collection and delivery of valuables for safe deposit." 83 Bankers' Magazine 808 (1911); see also 83 Bankers' Magazine 732 (1911).

[19] The trend toward new and expanded banking services is exemplified by an advertisement on p. 29 of the September 29, 1969, edition of the Wall Street Journal, in which The Bank of Virginia announces that with its "efficient new jet helicopters, we can provide banks and corporate customers much speedier transportation and communications; much faster availability of funds."

activities at points off premises which are not branches, but no one has suggested any workable distinction between the carrying on of these activities and the establishment of branches other than the distinction adopted by Congress, *i.e.*, the receipt of deposits or the payment of checks [20] or the lending of money.

There is nothing new or different about the agent-principal relationship which forms the basis of petitioners' case. National banks can and do act frequently as agents for their customers in many areas. There is no requirement that the operation of such agencies be confined to the banking house, and indeed some of the agent's duties—such as supervising real estate—would be impossible to perform at the banking house. The only peculiarity about the particular agency involved here is that at a given time and place agreed upon by the parties, the agency terminates and the agent receives the funds involved as his own and becomes the debtor of the principal or customer. Such a practice is not uncommon in banking and has been approved by the courts.[21]

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[20] Respondents' brief frequently confuses "cashing checks" with "paying checks." It is a common practice for many businesses, such as supermarkets, neighborhood bars and dry cleaners to cash checks, without violating the banking laws.

[21] See, *e.g.*, *Marchant* v. *Summers*, 79 F.2d 877 (4th Cir. 1935); *Bernstein* v. *Northwestern National Bank*, 157 Pa. Super. 73, 41 A.2d 440 (1945). As an everyday example, a bank is a mere collection agent for checks given to the bank by its customer for collection and deposit to the customer's account, and these checks do not become deposits until actually collected. *Dakin* v. *Bayly*, 290 U.S. 143 (1933); *Illinois Central R.R. Co.* v. *Rawlings*, 66 F.2d 146 (5th Cir. 1933), *cert. denied*, 291 U.S. 668 (1934); *Pascagoula Nat. Bank* v. *Federal Reserve Bank of Atlanta*, 11 F.2d 866 (5th Cir.), *cert. denied*, 271 U.S. 685 (1926); *In re Framers State Bank of Amherst*, 67 S.D. 51, 289 N.W. 75 (1939).

We believe the distinctions drawn by Congress in § 36(f) are the only workable ones to separate branches from such concedely lawful activities as banking by mail, officer call programs to solicit loans or other business, and the leaving of account cards in an attorney's office so that he may have them executed by his client. This, of all cases, is one in which the practical requirements of an intricate financial world demand only one result. We urge the Court to reverse the Fifth Circuit and hold that (1) federal rather than state law defines branch banking for national banks, and (2) the activities involved here are outside the ambit of the federal definition.

Respectfully submitted,

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FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 777.

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al.

No. 932.

WILLIAM B. CAMP, Comptroller of the Currency,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE A BRIEF FOR THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

The following state and national banks in Georgia and North Carolina hereby respectfully move for leave to file a brief as Amici Curiae in the above-entitled cases in support of Respondents:

The First National Bank of Gainesville
Gainesville, Georgia 30501

Gainesville National Bank
Gainesville, Georgia 30501

The Union County Bank of Blairsville
Blairsville, Georgia

Fannin County Bank of Blue Ridge
Blue Ridge, Georgia

Habersham Bank of Clarksville
Clarksville, Georgia

Bank of Clayton
Clayton, Georgia

The Peoples Bank of Cleveland
Cleveland, Georgia

Northeastern Banking Company of Commerce
Commerce, Georgia

Cornelia Bank
Cornelia, Georgia

Bank of Dahlonega
Dahlonega, Georgia

The Bank of Hiawassee
Hiawassee, Georgia

The Bank of Toccoa
Toccoa, Georgia

The Citizens Bank of Toccoa
Toccoa, Georgia

The Bank of Franklin
Franklin, North Carolina

The interests of Amici and their reasons for requesting leave to file a brief are set forth in the attached brief.

Respectfully submitted,

WILLIAM B. GUNTER,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 777.

THE FIRST NATIONAL BANK IN PLANT CITY, Plant City, Florida,
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WILLIAM B. CAMP, Comptroller of the Currency,
Petitioner,

v.

FRED O. DICKINSON, JR., Comptroller of the State of Florida, et al.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF THE FIRST NATIONAL BANK OF GAINESVILLE, GEORGIA, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

INTEREST OF AMICI CURIAE.

The First National Bank of Gainesville, Georgia, et al. (all named in the preceding motion for leave to file this brief) are fourteen national and state banks engaged in banking in Northeast Georgia and an adjacent portion of North Carolina.

As a result of and relying directly on paragraph 7490, the Comptroller's Manual for National Banks, and the

Florida District Court's judgment in the instant case, the First National Bank of Cornelia, Georgia began operation of a "bank messenger service" throughout Northeast Georgia and an adjacent portion of North Carolina in direct competition with amici banks and in violation, amici banks assert, of federal and Georgia banking statutes.

This situation resulted in litigation in Georgia similar to the instant Florida case in which amici banks appeared as plaintiff-intervenors in **Jackson v. First National Bank of Cornelia, Ga.**, 292 F. Supp. 156 (N. D. Ga., 1968). The Georgia case, after judgment for plaintiffs, was appealed to the Fifth Circuit, and further appellate proceedings have been stayed pending the decision of the Supreme Court in the instant Florida case.

In the Georgia case amici banks have plainly and strongly insisted that the administrative regulation promulgated by the Comptroller of the Currency and referred to as 7490 is illegal as being without statutory foundation in the National Bank Act.

The purpose of this amici curiae brief is to treat this one issue in as concise a manner as is possible.

PROPOSITION STATED.

The "administrative authorization" granted by the Federal Comptroller to national banks by Paragraph 7490, **the Comptroller's Manual for National Banks**, with respect to "messenger service" contravenes the federal statute, and is, therefore, an illegal "administrative authorization."

ARGUMENT.

Paragraph 7490 of the Comptroller's Manual for National Banks (A., p. 381) which authorizes national banks to "provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank" is an illegal "administrative authorization" in that there is no statutory basis for it in the National Bank Act, 12 U. S. C. 21, et seq.

Statutory authority for the issuance of this authorization can be looked for and allegedly discovered in only two sources—(a) as an "incidental" activity "necessary to carry on the business of banking" pursuant to 24 U. S. C. 24 (Seventh), or (b) as a branch bank pursuant to 12 U. S. C. 36.

Petitioners contend that the messenger service activity authorized by 7490 does not constitute branch banking; therefore, petitioners must necessarily contend that the statutory basis for the authorization is in 24 (Seventh) as an implied or incidental power necessary to carry on the business of banking.

It is highly significant that 7490 permits a national bank to provide messenger service only ". . . **pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than the bank**". This requirement is made for obvious purposes—if the messenger is admittedly the agent of the bank, his activity constitutes branch banking, and 7490 was designed to circumvent this pitfall.

By such circumvention, however, 7490 is left without a statutory foundation. A national bank cannot engage in the business of furnishing bank-paid employees (the messengers) and bank-owned equipment (the armored

cars) to others to act as the agent of others. Such furnishing of messengers and trucks to others becomes a chauffeured rent-a-truck operation which, we assert, is not an implied power of banking under 24 (Seventh).

"The extent of powers of national banks is to be measured by the terms of the federal statutes relating to such associations, and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established." **First National Bank v. Missouri**, 263 U. S. 640 at 656.

There is no **express** statutory authority for a national bank to furnish its personnel and its equipment to act as agents for others; likewise, the furnishing of such personnel and equipment to others cannot and should not be interpreted to be an incidental power under 24 (Seventh) and the decided cases construing that statute.

Therefore, if our assertion is correct, that the complained of activity permitted by 7490 is not an implied power of banking, then 7490 is an administrative regulation that has been illegally promulgated by the Comptroller of the Currency.

"Administrative determinations must have a basis in law and must be within the granted authority." **Social Security Board v. Nierotko**, 327 U. S. 358 at 369.

In **Bank of Cornelia**, supra, amici curiae banks here strenuously asserted that if the messenger is the agent of the bank, it amounts to proscribed branch banking in Georgia; and if the messenger is **not** the agent of the bank, then the bank is engaged in an activity not incidental to the business of banking and which is proscribed by 24 (Seventh).

The messenger service here contested has its basis in 7490, but if 7490 has no statutory basis, then both the Regulation and the messenger service it permits, having been placed under judicial scrutiny, collapse.

"An agency may not finally decide the limits of its statutory power. That is a judicial function." **Social Security Board v. Nierotko**, supra.

CONCLUSION.

Paragraph 7490 of the Comptroller's Manual goes beyond the permissible limits of administrative interpretation.

We urge that the judgment of the Fifth Circuit Court of Appeals be affirmed in this case.

Respectfully submitted,

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Certificate of Service.

I hereby certify that a copy of the foregoing Motion for Leave to file an Amici Curiae Brief and of the foregoing Amici Curiae Brief has been furnished by United States mail this 19th day of June, 1969 to:

Robert S. Edwards, Post Office Box 1119, Plant City, Florida, Attorney for The First National Bank in Plant City;

V. Carroll Webb, State Capitol, Tallahassee, Florida, Attorney for Fred O. Dickinson, Jr., Comptroller of Banking of the State of Florida;

Wm. Reece Smith, Jr., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Post Office Box 3239, Tampa, Florida 33601, Attorney for The Hillsboro Bank, et al.;

Alston, Miller & Gaines, 1100 Connecticut Avenue, Washington, D. C. 20036;

Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530;

and

C. Westbrook Murphy, Office of Comptroller of the Currency, Washington, D. C. 20220.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 19

THE FIRST NATIONAL BANK IN PLANT CITY,
Plant City, Florida, *Petitioner,*

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

No. 34

WILLIAM B. CAMP,
Comptroller of the Currency, *Petitioner,*

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

PETITION FOR REHEARING

Petitioner The First National Bank in Plant City, Florida, prays that this Court grant rehearing of its decision and judgment of December 9, 1969, affirming the decision and judgment of the Court of Appeals for the Fifth Circuit in the above-entitled cases.

REASONS FOR GRANTING REHEARING AND REVERSING THE FIFTH CIRCUIT

In its December 9, 1969, opinion, this Court construed § 7(f) of the McFadden Act of 1927, 44 Stat. 1228-1229, 12 U.S.C. § 36(f), which defined a "branch" bank to include an additional office or branch place of business "at which deposits are received." The Court specifically rejected the argument that this section was to be interpreted according to state law and held instead that what constitues a branch is a matter of federal definition. The Court concluded that any place apart from the chartered premises where funds are regularly handed over to and received by an employee of the bank, or a receptacle of the bank, is a branch under § 36(f).

In reaching this result, the Court recognized "the right of the contracting parties to fix rights and risks as between themselves" (Slip opinion, p. 13) but refused to give weight to these contractual arrangements in applying the language of § 36(f) to the transactions at issue. In so denying the effectiveness of contracts freely entered into by banks and their customers and approved by the appropriate banking supervisor, the Court has brought about a situation which cannot fail to generate chaos in the world of banking.

In particular, there are two matters of extreme importance which have not been but now must be brought to the Court's attention in order to demonstrate the confusion and discord which may confidently be expected to flow from the Court's opinion. These matters were not heretofore argued to the Court, either at all or in sufficient detail, because the entire thrust of the Court of Appeals opinion and of at least some of those presenting opposing briefs was that Florida law

controlled and that all off-premises activity was to be defined as branching. Now, that the Court has rejected that argument but has nevertheless held the armored cars and receptacles involved here to be branch banks, it is vital that the Court understand the practical consequences that will flow from its ruling, unless reversed on rehearing.

One point is that the Court's definition will undoubtedly be applied to other statutory provisions dealing with the receipt of deposits and in so doing will bring about results which the Court could not possibly have intended. The other is that if armored cars and stationary receptacles are branches, a number of practical problems arise, even where branches are legal under state law, which make the branch system inoperable for national banks and thus put them at a competitive disadvantage.

1. While the Court in its opinion purported to interpret only § 36(f) of the McFadden Act, we respectfully submit that no reason whatever appears why similar references to the receipt of deposits by banks and other financial institutions in other statutory provisions should not receive the same interpretation accorded § 36(f). To put it another way, the lower federal courts—and, indeed, this Court—could hardly be expected to treat armored cars and receptacles as branches receiving deposits for purposes of § 36(f) and to treat these same transactions differently in determining whether—as is true of all other branches—the funds received are insured by the FDIC, are subject to the reserve requirements of the Federal Reserve Board, and are protected by the federal criminal statutes. The extraordinary consequence of treating such funds as deposits when they are received by the

bank's employee or receptacle is illustrated by the following:

"Deposits" in branches and main offices of banks are what the Federal Deposit Insurance Corporation (FDIC) insures and upon which its assessments are based. The Act defines "deposits" to include a wide variety of transactions and then provides that a branch is, in part, any place of business at which "deposits are received." 12 U.S.C. § 1813. In *FDIC* v. *Continental Illinois National Bank & Trust Co.*, 245 F.2d 567 (7th Cir.), *cert. denied,* 355 U.S. 877 (1957), the court was required to determine whether certain items should be considered as "deposits" under the statutory definition for purposes of determining FDIC assessments. The court held that where two banks maintain "reciprocal accounts," only the net balance of the accounts—that is, the amount by which B's deposit in A exceeded A's deposit in B—was a "deposit," because it was this amount which represented the true measure of the debtor-creditor relationship. 245 F.2d at 570-572. In the same case, the court refused to treat as a deposit a "reserve" set up by the bank when it purchased an installment contract from a seller of consumer goods; this "reserve" was a percentage of the contract price which was not available to be drawn upon by the seller-depositor until the installment purchaser had fully performed his contract. Since there was no debtor-creditor relationship (although one would arise if the purchaser paid his contract according to its terms), there could be no deposit. *Id.* at 574-576. On the other hand, the court treated as deposits money withheld from employees' salaries for income taxes, Social Security contributions, life insurance premiums and the purchase of Government securities,

since there was a debtor-creditor relationship created with respect to those funds. *Id.* at 576.

It is obvious that great variations in the amounts of FDIC assessments might be created by variations in the treatment of various items as deposits. Therefore any confusion as to the proper definition of a deposit would inevitably lead to a mass of litigation.

In addition, the coverage of FDIC deposit insurance might well be called into question, as well as the issue of when "deposit liability" is to take effect so as to bind the FDIC under 12 U.S.C. § 264. See *FDIC* v. *Deaton,* 105 F.2d 677 (10th Cir. 1939). This becomes particularly important in the case of embezzlement or theft before the funds to be deposited reach the bank. *Cf. FDIC* v. *Records,* 34 F. Supp. 600, 601-602 (W.D. Mo. 1940); *Peters* v. *United States,* 94 Fed. 127, 146 (9th Cir. 1899).[1]

Another area to be profoundly affected by *Dickinson* is the Federal Reserve System. For one thing, if funds in armored cars are deposits of that bank, they must be counted as deposits for reserve purposes, and yet the computation of such funds under the applicable regulations (12 C.F.R. Pt. 204) would be a virtually impossible task. There are, moreover, other facets of the problem. Federal Reserve banks maintain ac-

[1] FDIC is also required by statute to make banks advertise that they are members of the association (12 U.S.C. § 1228(a)), and its regulations provide that the official sign shall be displayed at each station or window where insured deposits are "usually and normally received," both at the principal place of business and at "all its branches." 12 C.F.R. § 328.1(a). Failure to advertise in this manner results in a fine of $100 a day. Presumably, these requirements would now apply to each armored car and stationary depository.

counts for the member banks of the Federal Reserve System in carrying out their clearing house functions. Under 12 U.S.C. § 360, a Federal Reserve bank is required to "receive on deposit at par from member banks * * * checks and drafts drawn upon any of its depositors." In order to determine the state of any member bank's account at any given time, and therefore the bank's compliance with reserve requirements, it is necessary to determine when the Reserve Bank "received" a particular deposit. In *Pascagoula National Bank* v. *Federal Reserve Bank of Atlanta*, 3 F.2d 465 (N.D. Ga. 1924), *aff'd*, 11 F.2d 866 (5th Cir. 1926), *cert. denied*, 271 U.S. 685 (1927), the member bank argued that it was entitled to immediate credit to its account for checks sent to the Reserve Bank "for collection". The court rejected this contention; it defined "deposit" as meaning a "general deposit in which arises the relation of debtor and creditor, not that of principal and agent." 3 F.2d at 466. A check received "for collection" was not received for deposit, because the debtor-creditor relationship did not arise, under the regulations of the Federal Reserve System, until the expiration of a certain period of time, representing the usual time required to collect on the check. Until then, the Reserve Bank was only the agent of the member bank. "Since * * * credit is to be given at the expiration of the period fixed by the time schedule, whether returns from the check have actually been received or not, at that time, certainly the agency is to cease, and the check is to become and does become the property of the Reserve Bank, and the transaction ripens into a general deposit. The check is then 'received on deposit at par', as required by [12 U.S.C. § 360]." 3 F.2d at 467.

The dislocations that would be created in the banking system if the nature of Federal Reserve Bank deposits were changed would be tremendous, and the very suggestion of a change would loose a deluge of litigation.

Two statutory provisions relating to foreign banking will surely be affected by the Court's ruling. Under 12 U.S.C. § 615(a), corporations organized to engage in foreign banking (Edge Act corporations) are given power "to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States."

It is clear that the statute thus makes it of great importance to determine *where* a deposit is received. Edge Act corporations are given unlimited authority (subject, of course, to the rules and regulations of the Federal Reserve Board) to *receive* deposits outside the United States but are severely restricted if the deposits are *received* within the United States. This Court's ruling in *Dickinson* may well have two possible effects. First, it could encourage Edge Act corporations to set up a system of physical delivery of deposits outside the United States, regardless of where the deposits are contractually received, so as to avoid the statutory prescription. Or conversely, contractual provisions now carefully designed to assure that deposits are "received" outside the United States may be attacked and vitiated on the ground that, pursuant to *Dickinson,* physical receipt controls.

The other relevant statutory provision relating to foreign banking is in the very next subsection, 12 U.S.C. § 615(b), which gives Edge Act corporations the power

> To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

As pointed out in the second portion of this Petition, the Federal Reserve Board, as a result of the *Dickinson* ruling, may now have to set new rules and regulation relating to branches, since an entirely new set of such branches may spring into existence dependent upon where physical receipt of deposits is occasioned.

The Court's decision in *Dickinson* may well call for a restructuring of facilities on federal property and a re-evaluation of decisions such as *Texas* v. *National Bank of Commerce,* 290 F.2d 229 (5th Cir.), *cert denied sub nom. Falkner* v. *National Bank of Commerce,* 368 U.S. 832 (1961). In that case, the court was confronted with a situation in which the Secretary of the Treasury had designated two banks as depositories and financial agents of the United States to operate on Air Force bases, pursuant to 12 U.S.C. § 90. Among the functions which the facilities were limited to was "accepting deposits." Texas sought to prohibit the exercise of these powers on the grounds that the Texas Constitution did not permit branches; a Texas statute

provided that no bank could, *inter alia,* "receive deposits except in its own banking house"; and 12 U.S.C. § 36(c) allowed national banks to establish branches only where specifically authorized to do so by state law. The Court of Appeals, despite these arguments, ruled that § 90 gave the Secretary sufficient power to require the banks to operate on military installations. This Court's *Dickinson* ruling, however, will undoubtedly bring the Fifth Circuit's *National Bank of Commerce* decision into question and with it the entire authority of the Secretary to maintain financial facilities on the extensive military installations operated by the United States whenever and wherever such facilities would not be authorized by state law. This is so because § 90, upon which the Fifth Circuit depended, merely allows national banks to "perform all such reasonable duties as may be required of them," whereas this Court has now required § 36(f) to be interpreted in the light of a paramount policy of "competitive equality." The Air Force banks in the *National Bank of Commerce* case would undoubtedly be branches under this Court's ruling, and they would have to bow to the state prohibition.

The *Dickinson* decision will also have a disruptive effect in the field of criminal law. In *Lubin* v. *United States,* 313 F.2d 419 (9th Cir. 1963), for example, two men were convicted of conspiracy to steal property belonging to banks, as defined in 18 U.S.C. § 2113. Actually, the conspiracy was to take money and other property while it was being transported by an independent armored car service. The Court of Appeals reversed the convictions, holding that the conspiracy related to property owned by the armored car serv-

ice and not by the banks.[2] During its discussion, the Court made this highly significant comment:

> There was some discussion between the defendants about three markets and a catering company in the Sherman Oaks and Van Nuys areas, but it hardly rises to the dignity (if we may call it that) of proof of a conspiracy to take money from them, much less to take money belonging to one of the banks from one of Armored's trucks serving them. Two were not being serviced by Armored; *the other two had written contracts with Armored, and these indicate that the property to be transported belonged to Armored's customer, rather than to a bank.* [*Id.* at 422; emphasis added.]

In other words, the Court of Appeals relied upon the contract between the parties to define the status of ownership for purposes of the criminal statute. Quite obviously, such a contractual relationship might well be held inapplicable if this Court's *decision* were to remain in effect. We submit that rights, obligations and liabilities under criminal statutes should not be made subject to such possible misunderstanding or confusion.

But the concept of "branches" and "deposits" is far more complex than these few examples would suggest. These words, and all of the interrelationships

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[2] In a similar case, *United States* v. *Papworth*, 156 F. Supp. 842 (N.D. Tex. 1957), *aff'd*, 256 F.2d 125 (5th Cir.), *cert. denied*, 358 U. S. 854 (1958), the defendant was also indicted for conspiring to rob a banking facility on an Air Force base. He claimed that he could not have robbed a bank or banking institution under 18 U.S.C. § 2113(a) because the facility was a branch bank prohibited by the Texas Constitution and a Texas statute and thus had no valid existence. The court held the facility not to be a branch bank but an arm or agency of the federal government within the meaning of 12 U.S.C. § 90. As in the *Lubin* case, above, this ruling might well be suspect under the reasoning of *Dickinson*.

and legal consequences flowing from them, permeate the entire federal banking scheme. To cite but a few examples:

—Interest rates on deposits in banks, whether members of the Federal Reserve System or state non-member banks, may well depend on the precise time of receipt. See 12 U.S.C. § 1828(g); 12 C.F.R. Pts. 217, 329. Interest or dividend rates on deposits in Federal Home Loan Banks may similarly depend on the time when receipt of the deposits is accomplished. *Cf.* 12 U.S.C. § 1425(b).

—A branch of a building and loan association in the District of Columbia is defined in part as any place other than the principal office "at which accounts are opened or payments thereon are received"—a phrase presumably comparable to "any branch place of business * * * at which deposits are received." 12 U.S.C. § 1464.

—Subject to the approval of the Farm Credit Administration, any federal land bank "may establish branches within the farm credit district" and engage in a number of activities within each branch. 12 U.S.C. § 672.

—At least 25% of that part of the capital of any federal land bank for which stock is outstanding in the name of federal land bank associations may consist of "deposits in member banks" of the Federal Reserve System. 12 U.S.C. § 697.

—The Export-Import Bank of the United States is specifically authorized "to receive deposits" (12 U.S.C. § 635); federal credit unions are given power "to make deposits" (12 U.S.C. § 1757(9)), and no joint-stock

land bank has power "to receive deposits" unless expressly authorized (12 U.S.C. § 814).

What precise impact this Court's *Dickinson* ruling will have on each and all of these provisions and problems it is impossible to say. But one thing is clear. For this Court to have changed the traditional concept of a deposit and of a branch for purposes of § 36(f) will have a profound, far-reaching and as yet incalculable effect on areas of banking law as to which the Court could not have been, but must now be, aware.

2. As pointed out in the amicus brief filed on behalf of The National Association of Supervisors of State Banks (pp. 4-5), twelve states permit unlimited branches, and twenty-three allow branches with restrictions.

The Court in its *Dickinson* decision was directing its attention, due to the facts presented, to a state where branches are forbidden and to receptacles and armored cars which, by virtue of becoming branches under the Court's ruling, would be prohibited services. We respectfully submit that the Court has failed to appreciate the other side of the coin. If armored cars, for example, are branches under § 36, we have the problem not only of banks in legal-branch states operating cars in illegal-branch states, and vice versa, but of branches meeting both federal and state requirements relating to branches where such branches are legal. For if these cars are branches, they must, by law, meet all of the requisites that other, more orthodox, branches must meet. A few examples should suffice to show how impossible this would be:

(a) There is a requirement in 12 U.S.C. § 81 that "the general business" of a bank shall be transacted in the branches established under § 36. The general

business of a bank has been interpreted to include such activities as issuing and cashing Travelers Checks, opening and closing accounts, maintaining savings accounts, selling Government Bonds, making loans, etc. Yet how could depositories and armored cars possibly engage in these activities?

(b) No branch of a national bank can be established "or moved from one location to another" without the consent and approval of the Comptroller. 12 U.S.C. § 36(c).[2] What this means as a practical matter is that the Comptroller must issue a formal certificate[3]

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[2] The Federal Reserve Board and FDIC must give similar approval for operations under their jurisdiction. *E.g.*, 12 U.S.C. § 321; 12 U.S.C. § 1828(d). Whether an entirely new set of rules and regulations applicable to this new breed of "branches" will have to be promulgated is one of the many unanswered questions evoked by the *Dickinson* decision.

[3] This certificate reads:

COMPTROLLER OF THE CURRENCY

Treasury Department Of The United States
Washington, D.C.

WHEREAS, ...
located in ..... State of ..... being a National Banking Association, organized under the statutes of the United States, having made application to the Comptroller of the Currency for his approval of the establishment and operation of a branch at the following location:

AND, WHEREAS, it appears that such establishment and operation are in conformity with the applicable provisions of the statutes of the United States;

NOW, THEREFORE, I hereby certify that the necessary approval is given and that the said association is hereby authorized to establish and operate a branch at the location above mentioned.

IN TESTIMONY WHEREOF, witness my signature and seal of office this ..... day of ..... 19 ....

Charter No. .....
Branch Certificate No. .....

Comptroller of the Currency

to *every* branch. Moreover, the regulations require that the certificate issue for the branch "at the designated location." 12 C.F.R. § 4.5. How the statute and regulations can possibly be made to fit a roving armored car where such cars are legal under state law is impossible to imagine. A car making 400 calls on 100 customers a week, for example, may well require a separate certificate for each car, for each stop or customer, and possibly for each move from one location to another.

(c) Under 12 U.S.C. § 36(d), the aggregate capital of every national banking association "and its branches" may at no time be less than the aggregate minimum capital required of national banking associations as set forth in 12 U.S.C. § 51. Thus, each branch must meet minimum capital requirements—which is an impossibility in the case of depositories and armored cars. There are also minimum capital requirements for branches in 12 U.S.C. § 36(c).

(d) An Act passed by Congress last year required the Comptroller of the Currency, the Federal Reserve Board, the FDIC and the Federal Home Loan Bank Board to promulgate rules establishing minimum standards with which banks and savings and loan associations must comply with respect to the installation, maintenance and operation of security devices and procedures. 12 U.S.C. § 1882(a). These rules have now been promulgated by each of the relevant offices, and they are, with minor exceptions, identical. Typical are the rules of the Comptroller, which appear in 12 C.F.R. 21 and which specifically include a "branch authorized under 12 U.S.C. section 36" within the ambit of their requirements. The rules require, among other things, a lighting system, tamper-resistant locks,

an alarm system, photographic and recording equipment, a schedule for inspection of devices, procedures for removing excess currency, the use of "bait" money, the placing of "all currency, negotiable securities, and similar valuables" in "a locked vault or safe during non-banking hours," the designation of a person to inspect all locations where currency is stored after closing hours, and the keeping of records and filing of reports.

It is quickly obvious that armored cars and stationary depositories are incapable of complying with many of these standards.

(e) As pointed out above, if armored cars and depositories are branches, they must meet the requirements of state as well as federal law. Yet many states have requirements relating to branches that would seem wholly inoperable when applied to these facilities. For example, Michigan has extensive and elaborate provisions dealings with branches, including restrictions on the size of communities as well as counties, findings of public need and convenience, minimum capital requirements, approval of any change in location, minimum mileage restrictions in relation to other banks, etc. One need only visualize an armored car attempting to pick up receipts from toll booths on a turnpike traversing the state to comprehend the incredible legal maze that would envelope it. The car could pick up from booth 1; it could not pick up from booth 2, which is located within the limits of a city having a competing bank, or from booth 3, where no certificate of public convenience and necessity has been issued; it could proceed to booth 4, etc. That this is not a fanciful suggestion is illustrated by *First Citizens Bank and Trust Co.* v. *Camp,* 409 F.2d 1086 (4th

Cir. 1969), where the court held that the Comptroller is bound by "need and convenience" provisions of state laws governing branches.

(f) The Court's holding, if applicable to national banks in every state, could make national banks competitively unequal in the many states where armored car messenger operations are permitted to state banks. In California, for example, state and national banks are required to pick up funds from and deliver them to municipalities and other local governments. Calif. Government Code, § 53739. State law in California and in states permitting armored car operations to state chartered banks does not define such armored cars to be branch banks. Thus, in California a state chartered bank providing such a service need not obtain authorization from the Superintendent of Banks to establish a branch, or provide paid-up-capital of $50,000 to $300,000. See Calif. Banking Code §§ 500, 502 and 380. If, however, armored cars operated by national banks are "branches" in accordance with this Court's opinion, then banks providing such services in California and similar states must obtain the Comptroller's approval to establish a branch and must comply with the minimum capital requirements for establishing branches. See 12 U.S.C. § 36(c). Such a result is fundamentally inconsistent with making national banks competitively equal with state banks, the motivating policy which this Court found behind the McFadden Act.

(g) Although we have here restricted ourselves to the facilities specifically involved in this proceeding—armored cars and depositories—the clear import of the Court's ruling is that many other activities will come within the definition of branches if the Court's ruling

stands. Already, for example, moves are being made to attack the origination of loans by national banks off-premises, a practice long carried on by every major bank—both state and national—in the United States. The Independent Bankers Association of America has taken the position in a letter to the Comptroller of the Currency that such offices are prohibited to national banks, even in states which permit branches, because these offices are "unregulated branch activities without regard to state standards as to public convenience or necessity, or to location * * *." *American Banker,* December 24, 1969, p. 12.

(h) As pointed out in the amicus brief filed by twenty-two national banks, a number of other vital banking services may well come under interdiction by the states if *Dickinson* is allowed to stand. Credit card operations, the financing of new cars through automobile dealers, data processing services, money order sales through bank customers, the signing of trust agreements in law or business offices, the use of collectors for installment loans, and many other such functions that have traditionally been associated with the general business of banking will now become suspect as taking place at locations where "deposits are received, or checks paid, or money lent."

We submit that the Court could not possibly have intended the various results illustrated and synopsized in this Petition, and yet these results are the inescapable next step if the *Dickinson* ruling remains in effect.

WHEREFOR, petitioner respectfully prays that the Court grant a rehearing in the above-entitled cases concerning what the federal definition of "branch" in § 36(f) should be, now that it has been determined that

the definition is a federal one, and reverse the decision and judgment entered in said cases by the Fifth Circuit Court of Appeals.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 19 AND 34.—OCTOBER TERM, 1969

The First National Bank in Plant City, Florida, Petitioner, 19 v. Fred O. Dickinson, Jr., et al.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.
William B. Camp, Comptroller of the Currency, Petitioner, 34 v. Fred O. Dickinson, Jr., et al.	

[December 9, 1969]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In these cases we are called upon to construe § 7 of the McFadden Act of 1927, 44 Stat. 1228–1229, 12 U. S. C. § 36, as it relates to the definition of a branch bank for the purpose of determining the scope of branch banking available to a national bank in a State which prohibits branches for state banks.

12 U. S. C. § 36 (f) provides in pertinent part:

> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

Florida prohibits all branch banking by state chartered banks; by statute a Florida bank may "have only one place of doing business," and all the business of the bank is to be carried on at that place "and not else-

where." [1] The issue must be resolved by what constitutes a "branch" or "additional office"; there is a threshold question of the extent to which this is governed by federal law.

The First National Bank in Plant City, Florida, is a national banking association organized and operated pursuant to the National Bank Act, 12 U. S. C. § 21, *et seq.*; it sought and received from the United States Comptroller of the Currency permission to operate two services for the convenience of customers; one was an armored car messenger service and the other an off-premise receptacle for the receipt of packages containing

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[1] Florida Stat. c. 659.06 (1)(a) (1965) provides:

"659.06 *Place of transacting business; school savings; drive-in facilities.*—

"(1)(a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere.

. . . . .

"(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

"The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965."

cash or checks for deposit. The Comptroller's letter authorizing the armored car messenger service relied upon paragraph 7490 of the Comptroller's Manual for National Banks,[2] a relatively recent ruling which specifically authorizes such a service. A second letter authorizing construction of an off-premise receptacle authorized such a service "as an incident to" the bank's ordinary business. Both letters contained explicit instructions to First National designed to insure that deposits so received would not become bank liabilities until actually in the hands of the bank teller at the chartered office or regular "banking house"; and that checks cashed for customers would be deemed paid at the bank when the cash was handed to the messenger, not when the cash was delivered to the customer by the armored car teller.

Relying on these letters, First National offered an armored car service and a secured receptacle for receipt of monies intended as deposits. The bank advertised "Full Service Banking at your doorstep . . ." and a "mobile drive-in . . . where customers may be served . . . ." A more detailed examination of the services shows that customers having an account with First National could, upon signing a "Comprehensive

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[2] Manual of the Comptroller of the Currency of the United States for National Banks, ¶ 7490.

"*Messenger Service*

"To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer."

Dual Control Contract," [3] arrange to have the armored car call at their place of business to pick up cash and checks for deposit, or to bring cash to them in exchange for checks delivered to the armored car teller. The contract provided that in each situation the bank's armored car messenger would be the agent of the customer. Additionally, proffered deposits were accompanied by a transmittal slip upon which the customer itemized the funds being deposited in the same manner as with deposits made at the chartered office of the bank. The transmittal slip contained a "Contract" which provided that in this off-premise transaction the bank was the agent of the customer, and that "the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house." [4] Sums

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[3] "*Comprehensive Dual Control Contract*

"As agent for the undersigned depositor, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

"Under the Comprehensive Dual Control Contract, all monies, transported solely in padlocked money bags furnished by the bank, shall be opened only under the dual control of two bank's tellers. For this purpose, the bank will retain a pass key for depositor's bag(s); a key for each bag will be furnished depositor. The depositor expressly authorizes the service described and agrees to accept the bank's count of monies as final.

"The First National Bank in Plant City maintains hazard insurance covering holdup, employee fidelity, etc., for the benefit of the depositor for all amounts delivered to bank's messenger for delivery to bank and for all amounts requisitioned by depositor for delivery from bank to depositor. Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank's messenger for monies delivered to depositor . . . ."

[4] "*Contracts*

"First National Bank, Plant City, Florida, as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Florida

of cash for transmission to the customer are accompanied by a charge slip indicating that the customer's account had been charged for the amount of the order.

The armored car is owned and controlled by the bank; the teller and driver-guard in the car are bank employees. The bank paid the cost of armored car operations and assumed complete responsibility for the monies, checks, and deposits during transit by means of an insurance policy bought and paid for by it to protect the customer and the bank. The armored car service operates six days per week in Plant City and the surrounding trade area in Hillsborough and Polk Counties. The armored car has a plate glass window, a sliding drawer, and a counter on one side where customers may be served. The truck bears the name of the bank and has two-way radio-phone communication with the bank. All movements and routing of the armored car are directed by the bank. First National handled about $1,000,000 per week through the armored car.

The stationary off-premises receptacle for receipt of monies intended for deposit is located in a shopping center one mile from First National's banking house in a space leased by the bank. The facility consists of a secured receptacle for monies and night bags, together with a writing table supplied with envelopes and transmittal slips identical to those used by the armored car messenger service. The envelopes recite that the funds

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for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house. The bank maintains hazard insurance covering holdup, employee fidelity, etc. for the protection of the Principal for all amounts and items delivered to the bank's messenger by said Principal."

transported are accepted in accordance with the contract printed on the transmittal slip. A sign at the receptacle recites that the messenger who collects the funds acts as agent for the customer, that funds will not be deemed to have been made until delivered at the bank's premises, and that insurance on the funds is provided by the bank. Customers maintaining an account with the bank who had signed the Comprehensive Dual Control Contract were issued a key to open the off-premise depository to drop off the night pouches in the receptacle. The armored car serviced the receptacle daily. The armored car teller, upon making pick-ups of such night pouches, promptly identified all monies and other items placed in the depository and immediately recorded them by the depositor's number. The driver-guard verified all items collected by the teller and signed the written bank record identifying the monies obtained at the stationary depository.

On September 28, 1966, the Comptroller of the State of Florida, respondent herein, addressed a letter to First National advising it that the proposed depository then under construction and the provision of an armored car messenger service would each violate the prohibition under Florida law against branch banking. The letter requested that First National cease and desist all such operations.

First National then sued in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief against respondent. The United States Comptroller intervened as plaintiff on the side of First National; several state banks intervened to support the Florida Comptroller. The District Court granted judgment for plaintiff petitioners, 274 F. Supp. 449 (D. C. N. D. Fla. 1967). The Court

of Appeals reversed, 400 F. 2d 548 (C. A. 5th Cir., 1968). We affirm the Court of Appeals.

Federal Statute and Policy

The conditions under which national banks may establish branches are embodied in § 7 of the McFadden Act, 44 Stat. 1228–1229, codified in 12 U. S. C. § 36. One such condition is that a "branch" may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch, 12 U. S. C. § 36 (c).[5] *First National Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, 385 U. S. 252 (1966).

We have noted that the State of Florida permits no branch banking under a statute providing that banks are to "have only one place of doing business"; the business of the bank may be transacted at that place "and not elsewhere."[6] The parties agree generally that the McFadden Act permits national banks to branch if and only if the host State would permit one of its own banks to branch; the Florida Bank Comptroller insists the State of Florida unequivocally forbids off-premise banking of any kind. Thus the lines are clearly drawn; the

[5] The National Bank Act, 44 Stat. 1228, 12 U. S. C. §§ 36 (c) (1) and (2) provides:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches; (1) within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

[6] See n. 1, *supra*.

question presented is whether the activities of First National authorized by the United States Comptroller are branch banking.

At the outset we note that, while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state banks place on branch banking activities. Congress has deliberately settled upon a policy intended to foster "competitive equality." *Walker Bank, supra,* 385 U. S. 252, 261. State law has been utilized by Congress to provide certain guidelines to implement its legislative policy.

We need not review the legislative history of the McFadden Act and prior national bank legislation as it relates to this problem; that task was performed by MR. JUSTICE CLARK in *Walker Bank, supra,* where a unanimous Court noted that the McFadden Act was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area. That Act reflects the congressional concern that neither system have advantages over the other in the use of branch banking. A House Report shows that in 1926 there was congressional concern to protect national banks from the unrestricted branch bank competition of state banks:

> "The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of statewide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." H. R. Rep. No. 83, 69th Cong., 1st Sess., 7 (1926).

The bill to which this report was addressed failed to pass in the Senate. In tracing the legislative history of

the bill which passed the following year, this Court in *Walker Bank, supra,* observed:

> "The intent of the Congress to leave the question of the desirability of branch banking up to the States is indicated by the fact that the Senate struck from the House bill the time limitation, thus permitting a subsequent change in state law to have a corresponding effect on the authority of national banks to engage in branching. The Senate Report concluded that the Act should permit 'national banks to have branches in those cities where State banks are allowed to have them under State laws.' " S. Rep. No. 473, 69th Cong., 1st Sess., 14 (1926). 385 U. S. 252, 258.

At the time of its enactment into law, Representative McFadden stated that:

> "As a result of the passage of this act, the national bank act has been so amended that *national banks* are able to meet the needs of modern industry and commerce and *competitive equality* has been established . . . ." 68 Cong. Rec. 5815 (1927). (Emphasis supplied.)

When the economic depression of the 1930's brought on widespread bank failures, Congress responded by amending the McFadden Act with the passage of the Banking Act of 1933, which further strengthened the policy of competitive equality. Some Members argued that bank failures were due to the undercapitalization of small rural banks and sought to authorize national banks to engage in branch banking without regard to state law; but that approach was rejected. As finally passed, the Act was reported to the House by one of the members of the Conference Committee, Representative Luce, with this statement:

> "In the controversy over the respective merits of what are known as 'unit banking' and 'branch

> banking' . . . branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. *We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches.*" 385 U. S. 252, 260, quoting from 77 Cong. Rec. 5896 (1933). (Emphasis supplied.)

The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.

We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36 (f).[7] Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank, supra,* for in § 36 (c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result as appears from the inclusion in § 36 of a general definition of "branch." On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be

[7] In their briefs before this Court, the litigants are all in agreement that federal law alone applies to resolve the threshold question whether the challenged activity falls within the definition of "branch." Reply Brief for the Comptroller of the Currency, p. 2; Respondent's Brief, pp. 41, 44.

determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned "the two ideas shall compete on equal terms and only where the States [allow] their own institutions [to] have branches." In short, the definition of "branch" in § 36 (f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.*[8]

Federal Definition of Branch Bank

Against this background, we turn to the question whether the off-premises business activities conducted by First National amounted to "branch" banking within the meaning of the McFadden Act. Since national banks are "necessarily subject to the paramount authority of the United States," *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 656 (1924), we consult that part of the McFadden Act which defines the term "branch." 12 U. S. C. § 36 (f) provides:

> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term.

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[8] Representative McFadden described the definitional section of the Act as providing that:

"any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office is a branch." 68 Cong. Rec. 5816 (1927).

However the term "branch bank" at the very least includes *any* place for receiving deposits or cashing checks or lending money apart from the chartered premises; it may include more. It should be emphasized that, since § 36 (f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking place. Thus not only the taking of deposits but also the cashing of checks or the lending of money could equally well provide the basis for such a finding. Although the District Court briefly discussed the possibility that checks were being cashed, we confine ourselves to the question of whether deposits were received. Specifically, we must resolve the question whether the mobile armored car service and stationary deposit receptacle singly or together fall within the ambit of that section. As to the receiving of deposits, the functions of the two facilities are essentially the same, hence they may be considered together.

First National and the Comptroller of the Currency urge that the challenged activity does not amount to branch banking under § 36 (f). First National relies heavily, if indeed not entirely, upon carefully drawn contracts with its customers who use armored car or deposit receptacle services. The bank urges that, "deposit" being a word of art, the determination of when a deposit is made is not a casual one inasmuch as that determination fixes important legal relationships of the parties.

The bank also urges that creation of a deposit being purely a matter of intent, the issue is governed exclusively by the private contract. Since these contracts must be interpreted under state law, the argument runs, no "deposit" is actually received as such until monies delivered to the armored car or the receptacle are physically delivered into the hands of a bank teller

at the chartered premises. Until such time the bank may not, under the contracts, be held to account for the customer's funds.

We have no difficulty accepting the bank's argument that the debtor-creditor relationship is a creature of contract and that the parties can agree that until monies are physically delivered to the bank no deposit will be credited to the customer's account.[9] We are satisfied, however, that the contracts have no significant purpose other than to remove the possibility that the monies received will become "deposits" in the technical and legal sense until actually delivered to the chartered premises of the bank.

We do not challenge the right of the contracting parties to fix rights and risks as between themselves; nothing in the law precludes the parties from agreeing, for example, that the bank does not assume the status of bailee, with liability for loss of money in transit. But while the contracting parties are free to arrange their private rights and liabilities as they see fit, it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36 (f).

Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor

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[9] 5A Michie on Banks and Banking §§ 4a, 5, 14, 15 and 17; 10 Am. Jur. 2d Banks § 358; 9 C. J. S. Banks and Banking § 269.

and creditor is established at the moment of receipt or somewhat later.

We need not characterize the contracts as a sham or subterfuge in order to conclude that the conduct of the parties and the nature of their relations bring First National's challenged activities within the federal definition of branch banking. Here, penetrating the form of the contracts to the underlying substance of the transaction, we are satisfied that at the time a customer delivers a sum of money either to the armored truck or the stationary receptacle, the bank has, for all purposes contemplated by Congress in § 36 (f), received a deposit. The money is given and received for deposit even though the parties have agreed that its technical status as a "deposit" which may be drawn on is to remain inchoate for the brief period of time it is in transit to the chartered bank premises. The intended deposits are delivered and received as part of a large-scale continuing mode of conducting the banking business designed to bring basic bank services to the customers.

Since the putative deposits are in fact "received" by a bank facility apart from its chartered place of business, we are compelled, in construing § 36 (f), to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an "additional office or . . . branch place of business . . . at which deposits are received." [10]

Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks. The utility of the armored car service and deposit receptacle are obvious; many States permit state chartered banks to

[10] We need not here try to draw fine distinctions around relatively isolated, sporadic, and inconsequential transactions where a bank employee carries cash to a customer to cash a check, or secures a signature on a note in exchange for a check delivered off premises.

use this eminently sensible mode of operations, but Florida's policy is not open to judicial review any more than is the congressional policy of "competitive equality." Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency.[11]

Affirmed.

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[11] In 1963 Comptroller Saxon, author of ¶ 7490 in the Comptroller's Manual for National Banks, *supra*, n. 2, declared that "the branching powers of National Banks should, in my judgment, not be limited according to those policies which the individual States find appropriate to meet their local needs through State-chartered banks." Saxon, *Branching Powers and the Dual Banking System*, 101 Compt. Currency Ann. Rep. 316, 318 (1963).

During the course of the congressional debates over what became the McFadden Act, Representative Stevenson remarked:

"you have branches in the Federal Reserve System established by the dictum of the Comptroller of the Currency, who has assumed to say that he can allow a national bank to establish as many agencies for receiving deposits and paying checks as he sees fit . . . . I will show presently that we cut that out, root and branch." 66 Cong. Rec. 1627 (1925).

SUPREME COURT OF THE UNITED STATES

Nos. 19 AND 34.—OCTOBER TERM, 1969

The First National Bank in Plant City, Florida, Petitioner, v. Fred O. Dickinson, Jr., et al.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December 9, 1969]

MR. JUSTICE DOUGLAS, dissenting.

It will come as a shock, where common sense is the guide, to learn that an armored car picking up merchants' cash boxes and checks is a branch bank. Conceivably a bank could use an armored car as a place of business by stationing it at designated places during designated hours for opening accounts, receiving deposits, making loans, and the like. But no armored car was so used in these cases.

Federal law stated in the McFadden Act, 12 U. S. C. § 36 (f), defines "branch" as any facility "at which deposits are received, or checks paid, or money lent." And Congress provided that national banks may establish "branches" whenever, wherever, and however state banks may do so. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 261–262. The opinion of the Court leaves the impression that the McFadden Act created "competitive equality" between national and state banks across the boards. But as we stated in the *Walker Bank* case, that Act "intended to place national

and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" (Italics added.) *Id.*, at 261. There was no other or additional overriding principle of "competitive equality" that limits off-premises services of national banks to those that state banks can provide.

Among those off-premises activities of national banks was the furnishing of armored car messenger services, which, we are advised by the Comptroller of the Currency, antedated by many years the 1927 McFadden Act. One can read the legislative history of the Act without finding any hint that Congress was providing "competitive equality" as respects armored car messenger services.

As stated by the District Court, "If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks." 274 F. Supp., at 453.

The services rendered in these cases were undertaken only after approval by the Comptroller of the Currency who attached a condition that "the messenger is the agent of the customer rather than of the bank."[1] I thought it was elemental law that a bank deposit cannot arise without some unequivocal act whereby both parties express their consent to the creation of the status of debtor and creditor. The District Court, who is a more faithful exponent of local law than are we, so

[1] Par. 7490, Manual for National Banks of the Comptroller of the Currency of the United States. This paragraph provides:

"To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer."

ruled. 274 F. Supp., at 454. Certainly the Comptroller, who is the supervisory agency for policing § 36, has some authority to define "deposits" as used in § 36 (f), and this case affords no excuse for disparaging him. This is not a government by administrative *fiat;* the exercise of administrative discretion is normally subject to judicial review. When it comes to an administrator's construction of a statutory term in the law which he supervises, however, we have allowed his expertise great leeway in the definition,[2] only rarely disturbing it.

The Comptroller's definition of "deposits" should be honored here. For where the risk is on the customer that his cash and checks may never reach the bank, he cannot in good sense or in good law be deemed to have made a deposit while the funds are in transit.

By the standards of administrative law honored until today, the Comptroller was justified in defining "deposits" to make the armored cars messengers of the customers, not agents of the bank. So whether common sense or the law is our standard, the judgment of the Court of Appeals should be reversed. The Comptroller's authorization of these armored-car activities were permissible under the National Bank Act was an interpretation of the Act which, as MR. JUSTICE STEWART says in his dissent, cannot be said to be "not a reasonable one."

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[2] See *SEC* v. *New England Electric System,* 384 U. S. 176, 185; *Udall* v. *Tallman,* 380 U. S. 1, 16; *United States* v. *Drum,* 368 U. S. 370, 374–376; *NLRB* v. *Coca-Cola Bottling Co.,* 350 U. S. 264, 269; *Unemployment Compensation Comm'n* v. *Aragon,* 329 U. S. 143, 153–154; *NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130–131; *Gray* v. *Powell,* 314 U. S. 402, 411–413; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146; Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 261; Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 Vand. L. Rev. 470, 490–491.

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[December 9, 1969]

MR. JUSTICE STEWART, dissenting.

I wholly agree with the Court that federal law is to be applied in determining whether the activities of a national bank constitute branch banking under the exclusive definition contained in the National Bank Act, 12 U. S. C. § 36 (f). Whether the activities here in question constitute branch banking under that standard seems to me an extremely close question. That being so, I would defer to the determination of the Comptroller of the Currency. He is the official charged with administering these provisions of the Act, and I cannot say his determination was not a reasonable one. See *Udall* v. *Tallman*, 380 U. S. 1, 16–18.